THE CONVEYANCER AND PROPERTY LAWYER

VOL. 20, No. 1 JANUARY—FEBRUARY, 1956

CONVEYANCER'S NOTEBOOK

EXTENSION OF COMPULSORY REGISTRATION TO OLDHAM

By the Registration of Title (Oldham) Order, 1955 (S.I. 1955, No. 1804), made under section 120 of the Land Registration Act, 1925, at the instance of the Oldham borough council, registration of title is to be compulsory on sale in the County Borough of Oldham on and after October 15, 1956.

REGISTRATION OF LEASES

In the *Law Society's Gazette* for December, 1955, in a quiz entitled "How good are you at your job?" there was one particularly interesting conundrum on the registration of leases. If a lease is granted for a period of between twenty-one and forty years, does it require registration at H.M. Land Registry? The answer which we think would occur to most practitioners is that a lease not exceeding twenty-one years does not require registration, a lease over forty years in a compulsory area does and you can make your choice if the term is between twenty-one and forty years (Land Registration Act, 1925, ss. 8 and 123; Gibson's *Conveyancing*, 17th ed., pp. 623, 625). If the lessor's title is registered a notice should be registered against it, unless the lease is an overriding interest, *i.e.*, a lease not exceeding twenty-one years, but this has nothing to do with registration of the title to the lease (s. 48; Gibson, p. 661). The answer given in the *Gazette* is that a lease between twenty-one and forty years requires registration if, and only if, the lessor's title is registered, whether the land is in a compulsory area or not, citing section 123 and *Brickdale & Stewart Wallace*, 4th ed., pp. 42–43.

Sections 8 and 123 would lead one to believe that only in a compulsory area is registration of title compulsory and that leases

with less than forty years to run are not registrable compulsorily. The argument of *Brickdale & Stewart Wallace* is based on sections 18, 19 and 20. Section 18 (i) (*e*) provides that a registered proprietor may grant leases in the prescribed manner and leases are dispositions (s. 18 (5)); section 19 (2) provides that dispositions require completion by registration; and section 20 provides that the title of the freeholder is subject to the incumbrances and other entries appearing on the register and the overriding interests affecting the property. Clearly, the lease must be registered against the freeholder's title, but whether the argument of *Brickdale & Stewart Wallace* is sound seems more doubtful. However, while the lessee is registering against the freeholder's title he might as well register the title to the lease.

Stamp Duty on Deed of Covenant

At page 521 of Vol. 17 of the *Conveyancer* we published a precedent of a deed of covenant for the benefit of an infant for the maximum amount for the time being allowed without depriving the infant's parent of the child's allowance, and the footnote gave the stamp duty as 10s. as a deed stamp, the covenant being for an indefinite amount. For some time deeds in the form of the precedent were stamped 10s. without question. Then we heard that on submission to the stamp office different sums were being marked and accordingly we recently submitted such a deed for adjudication. Duty was assessed at 15s., of which 5s. was attributed to bond covenant duty on the footing that the sum payable during the first year was ascertained. Strictly speaking this is not correct: until the Finance Act is passed the amount is not ascertainable, so that presumably on any footing a deed executed between April 6 and the passing of the Finance Act is only liable to a 10s. deed stamp; secondly, until the end of the year the amount payable under the deed is not ascertainable, for regard has to be had to the infant's other income, but the Revenue's practice to charge on the maximum is well known (see Monroe's *Law of Stamp Duties*, p. 17). Accordingly, until some Hampden decides to take the Revenue to court over 5s. the duty is likely to be at 15s. instead of 10s.

Revaluation for Rating and Rent Restricted Premises

A number of inquiries received have shown that some misconceptions exist about this subject. A note on page 83 deals with the more important points.

THE JUDICIAL POWERS OF THE CHIEF LAND REGISTRAR

ANOTHER RECENT DECISION

By Theodore B. F. Ruoff, Solicitor

The Chief Land Registrar has recently determined a dispute about the title to land which illustrates his wide powers of dispensing justice speedily and without undue expense to the parties. Rule 298 of the Land Registration Rules, 1925, provides that "if any question, doubt, dispute, difficulty or complaint arises before the Registrar upon any application or during any investigation of title, as to the registration of a title . . . (whether such questions relate to the construction, validity or effect of any instrument, or the persons interested, or the nature or extent of their interests . . .) the Registrar shall hear and determine the matter and, subject to appeal to the [High] Court, make such order in the matter as he shall think fit." Rule 299 provides that "any person aggrieved by an order or decision of the Registrar may appeal to the [High] Court."

The jurisdiction of the Chief Land Registrar so conferred is not limited either territorially or in regard to the value of the property involved—in fact, about a year ago, he determined a question concerning the title of property of vast value. Yet the available remedies are relatively cheap because there are no court fees. All costs are in the discretion of the Chief Land Registrar by virtue of rule 321, but they will, unless the parties otherwise agree, be taxed on the High Court scale as he directs by the taxing officers of the Supreme Court. Under section 17 of the Land Registration Act, 1925, they are taxed as between solicitor and client.

In the recent case, the following facts were proved or admitted. In 1898 eleven men and one woman, being imbued with Tolstoyan teachings, founded a colony at Whiteway, Gloucestershire, where they acquired 45 acres of land for their communal use. Three of them were persuaded with great difficulty to allow themselves to be named as purchasers and took a conveyance of the fee simple which was vested in them as joint tenants, but because of their hatred of the notion of the private ownership of property, after receiving their title deeds, they burned them in the presence of their fellow colonists. If they thought that by so doing they

divested themselves of the legal estate they were, of course, wrong. In 1901 there were some changes in the colonists' precepts, for thenceforth individual members were permitted to take and cultivate as much land as they could manage (usually one acre) and they were allowed to fence in their holdings and erect buildings on them. Later still the ideas of the community underwent further changes and the principle of "use-occupation," or "use-possession," came to be recognised. Under this principle a colonist got the use, but not the ownership, of the land he occupied, although upon vacating his land he was allowed to sell any buildings he had put up to a new occupant. Even a man's "use-occupation" depended on the will of the community, for no one could enter into or remain in the possession of land without permission from the colonists. In 1913 the applicant's husband bought a house from the previous occupier, an original colonist who was about to leave the colony, and was let into possession of about two and a quarter acres of land on part of which it stood.

Some time after taking possession the applicant and her husband began to ignore their fellow colonists, staying away from their meetings and refusing to sign documents which were drawn up from time to time setting out the doctrine of "use-occupation." Moreover, they themselves paid the rates and taxes on their plot. The applicant's husband died in 1948, leaving all his property to her and she claimed that his estate included the two and a quarter acres in Whiteway.

So believing, in 1954 she displayed on the plot a "For Sale" notice and later entered into a contract for the sale of this land. The community, learning of these happenings, lodged by their present secretary a caution against first registration of the land at H.M. Land Registry under section 53 of the Land Registration Act, 1925, as being persons having or claiming such an interest in land of which the title was not already registered as entitled them to object to any disposition of it being made without their consent. The effect of this was that the cautioning colonists became entitled to receive a notice from H.M. Land Registry of any application that might be made for the registration of an interest in the land affecting such rights as they claimed. Hence when, a little later, the applicant sought first registration of the title to the two and a quarter acre plot with an absolute title, supporting her application with a statutory declaration as to long possession, the Chief Land Registrar notified the cautioners of the fact. They lodged a written objection to the application and a dispute having arisen within the meaning of rule 298 of the Land Registration Rules,

1925, the Chief Land Registrar notified the parties that he would hear and determine it. Thereafter the only survivor of the original estate owners, then an old and sick man, was brought into the proceedings by virtue of proviso (a) to section 13 of the Land Registration Act, 1925.

Both parties appeared by counsel, a number of witnesses were called by each, and the facts set out above were elicited. For the applicant it was contended that her husband had originally been a tenant at will, and that the tenancy was deemed to be determined and adverse possession had begun at the end of one year from the date of their taking up occupation by virtue of the Limitation Act, 1939, s. 9 (1). Even if their possession was not then adverse, there was ample evidence of many acts both by the applicant and her husband on the one hand and by the colonists on the other hand which indicated that it later became adverse to the title of the colonists. The applicant and her husband had all through the years remained in exclusive occupation of the land, they had paid the rates and taxes attributable to it, they had consistently refused to sign the declarations as to the basis of their occupation which the colonists periodically put before them, and they stayed away from the colonists' meetings.

For the objecting colonists it was said that the possession of the applicant was not adverse because it was referable to a lawful title. She and her husband were let into possession as licensees and all the acts upon which the applicant relied were equivocal in their significance. The colonists, disliking all forms of violence as much as they disliked the private ownership of property, did not attempt to eject the applicant from the house even after her husband's death when she began to treat the property as her own, although they often protested about her use of the land and had threatened to cut down the enclosing hedges. The colonists relied upon the decision in *Errington* v. *Errington* [1952] 1 K.B. 290 in which Denning L.J. reviewed a number of cases defining the differences between a tenant and a licensee, and upon that in *Cobb* v. *Lane* [1952] 1 All E.R. 1199, where it was held that the fact of the exclusive occupation of property for an indefinite period is not inconsistent with the occupier being a licensee and not a tenant at will. Whether or not a relationship of landlord and tenant has been created depends on the intention of the parties, and in ascertaining that intention the court must consider the circumstances in which the occupier went into occupation and whether the conduct of the parties shows that he was intended to

have an interest in the land or merely a personal privilege without any such interest.

In giving judgment the Chief Land Registrar said that all the witnesses had agreed that the land was enjoyed by means of " use-occupation " or " use-possession," and he held that that, as described by them, meant that the applicant was a licensee and not a tenant, although he would not deal with the question of who was the present licensor. It was clear from the evidence that so long as a colonist occupied the building and cultivated the land allotted to him the arrangement was that he could stay there for his life. The Registrar did not think that the committee of the colonists, even if they acted as agents for the surviving estate owner, were legally competent to interfere with the possession of a colonist so long as he adhered to the conditions of " use-occupation," and it was not necessary, in this connection, for him to attend the meetings of the colony. The Chief Land Registrar referred to a passage in the *Errington* case (at p. 297), quoting Lord Greene M.R. (in *Brooker* v. *Palmer* [1942] 2 All E.R. 674, at p. 677), in a case in which the criterion was whether there was a licence or a tenancy, when he said: " There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind." This passage was very much in point, because it was one of the fundamental tenets of the colonists that they did not enter into legal relationships.

Although it was difficult to see how the colonists could evict one of their number unless or until he did something inconsistent with " use-occupation," and although the occupation of the applicant was not adverse to the title of the surviving original colonist before 1954, she then did an overt act which was as repugnant to his title as it was to the tenets of the colonists, namely, she attempted to sell the land. The colonists immediately took steps to assert their rights, that is to say, they cautioned against first registration, and from that time onwards they maintained their rights by opposing the application for registration. Accordingly, the Chief Land Registrar dismissed the applicant's application for first registration with costs.

VOID PROMISES AS CONSIDERATION

By John C. Smith, m.a., ll.b., Barrister-at-Law

It is difficult to reconcile the decision of Wynn-Parry J., sitting as judge of the Queen's Bench Division, in *Rajbenback* v. *Mamon* (*a*) with earlier decisions of the Court of Appeal. The plaintiff was the tenant and the defendant the landlord of a flat subject to the Rent Restriction Acts. In May, 1954, the plaintiff and the defendant orally agreed that the plaintiff would vacate the flat at the end of 1954 and that, in the event of his so doing and in consideration thereof, the defendant would pay him £300. The plaintiff always intended to carry out the agreement but, before he had vacated the flat, the defendant repudiated the agreement. The plaintiff brought an action claiming a declaration "that in the event of his delivering up to the defendant vacant possession of the flat on or before January 1, 1955, he should be entitled to payment from the defendant on that date of the sum of £300."

It was argued on behalf of the defendant that the agreement was an attempt to contract out of the Rent Acts and, as such, void and unenforceable. The case relied on was *Barton* v. *Fincham* (*b*) where an action for possession, brought by a landlord relying on an agreement similar to that in the present case, failed. However, as Wynn-Parry J. pointed out, the Court of Appeal in that case said nothing about the argument, used in the court below, that such agreements are against public policy. The case did decide that the court has no jurisdiction to enforce such an agreement against the tenant. It was then argued that in the instant case the agreement, as it could not have been enforced against the plaintiff, was void for want of mutuality.

The learned judge rejected this argument. He pointed out that if the plaintiff did quit, as he intended, the defendant would get all that he sought. He said:

> "Ordinarily in a contract there would be mutuality, but many examples (if necessary) can be given where Parliament has stepped in and, to some extent, robbed a contract of some degree of mutuality without destroying it, and I think that this is one of those contracts."

(*a*) [1955] 1 Q.B. 283; [1955] 1 All E.R. 12.
(*b*) [1921] 2 K.B. 291.

In the result, the plaintiff obtained the declaration he sought. Unfortunately the attention of the judge does not appear to have been drawn to the decisions of the Court of Appeal, discussed below, to the effect that void promises are no consideration. Just as a tenant of rent-controlled premises cannot bind himself to give up possession, so a wife who is divorced or separated from her husband cannot bind herself to refrain from asking the court for permanent maintenance: *Hyman* v. *Hyman* (*c*). In *Gaisberg* v. *Storr* (*d*) the Court of Appeal held that a husband's undertaking to pay maintenance to his wife was *nudum pactum* where the only consideration for it was a promise by the wife not to apply to the court for alimony. *Gaisberg* v. *Storr* was followed by Byrne J. in *Combe* v. *Combe* (*e*) and his judgment on this point was approved by the Court of Appeal (*f*). Denning L.J. said:

> "If it were suggested that, in return for the husband's promise, the wife expressly or impliedly promised to forbear from applying to the court for maintenance—that is, a promise in return for a promise—there would clearly be no consideration, because the wife's promise was not binding on her and was therefore worth nothing."

Actual forbearance from applying for maintenance, as opposed to a mere promise to forbear, would, apparently have been held to be a good consideration, if only that forbearance had been at the request of the promisor, but that was not the case. Similarly in *Rajbenback* v. *Mamon* it would seem that actual quitting of the premises would undoubtedly have been a good consideration. But that was of no assistance to the plaintiff as he was still in possession: if there had been an offer of a unilateral contract it had not been accepted and was now revoked. The plaintiff was therefore forced to argue that there was a bilateral contract and that the consideration was his promise to quit. But this promise was just as worthless as those made by the wives in *Gaisberg* v. *Storr* and *Combe* v. *Combe*. If there was no consideration in those cases, surely there was none in this.

It is perhaps unfortunate that Wynn-Parry J. did not mention some of the examples he had in mind of cases where Parliament has "to some extent, robbed a contract of some degree of mutuality without destroying it." Possibly the words "to some extent" and "of some degree of" are vital. For it is clear that there are cases where statute has invalidated *some* of the promises made by

(*c*) [1929] A.C. 601.
(*d*) [1950] 1 K.B. 107.
(*e*) [1950] W.N. 552.
(*f*) [1951] 2 K.B. 215.

one party to a contract, while leaving the contract subsisting, for example, where the parties to a lease have agreed on a rent in excess of the standard rent, or where a passenger in a public service vehicle has agreed to a limitation of the carrier's liability (*g*). But where the consideration alleged consists of only one promise which is not binding it is difficult to see that there is any consideration whatever.

One possible case where a contract is enforceable by one party though the other's obligations are wholly void is that of a contract within section 1 of the Infants Relief Act, 1874. That section provides that certain classes of contracts entered into by infants shall be " absolutely void," but it has been argued that " . . . the Act, being for the protection of the infant, may not have been intended to apply to the case of the [adult's] liability at all, the contract being enforceable by the infant at his option, as at common law " (*h*). If this is so, it provides a parallel for the decision of Wynn-Parry J., but it is submitted that the rules relating to infants are anomalous and should have no application to a contract between two adults.

(*g*) Road Traffic Act, 1930, s. 97.
(*h*) Benjamin on *Sale*, 8th ed., 52.

THE MEANING OF " LAND " IN THE PROPERTY LEGISLATION

By A. Kiralfy, Barrister-at-Law

A number of recent cases have made it necessary to examine the first principles of the land law. This examination reveals a disquieting variety of definitions of land in the relevant statutes. If the term " land " in its various forms and extensions were interpreted by strict limitation to the particular context the result would be narrow but reasonable. It is quite common, however, for cases to be decided on this point of interpretation by the citation of decisions on quite different points. It is the object of this article to refer to a number of different interpretations of " land " in order that the danger of following other decisions, a danger to which the courts are themselves far from blind, may be reduced. It will also be suggested what the intention of the legislature may have been in some of these cases, but here no particular authority can be claimed.

The distinction between " real " and " personal " property had become well known by the nineteenth century. Several centuries of academic and judicial analysis had made it fairly clear which types of assets belonged to one category or the other. " Tenements " and " hereditaments " referred exclusively to real property. The profession was not satisfied with the result, because some of the distinctions appeared antiquated or arbitrary. This applied both to the classification of various interests as respectively " real " or " personal " and to the substantial differences between the rules applied by the law to the two classes of property. A two-pronged attack was therefore launched. There was to be a gradual assimilation of the law on both topics, so far as not precluded by the physical nature of the assets. There was also to be a more logical division where that physical nature precluded assimilation. We have seen how the law of intestate succession to real and personal property has been assimilated. We have also seen how certain forms of personalty, known as chattels real, have been brought within the rules of the old field of real property. This acceptance had already been prepared by the use of fictitious actions like ejectment and by the jurisdiction of the Chancery, so that old problems like seisin no longer possessed much relevance, and rules of beneficial disposition were

already much the same for all forms of property connected with land.

It is with the second method, the reclassification of interests in the old field of real property, that we are here concerned. Having to abandon the old classification no clear new classification was substituted. Some form of reference to "land" has been considered to be enough in recent statutes. To state in succession the divergent definitions and descriptions used in various sections of the property legislation would be to bewilder the reader. The result has been to leave the already over-burdened judiciary to create from the bench new classifications of interests in property after argument in which the particular intention of the legislature, in itself nebulous enough, has been weakened by citation of previous decisions in related but not identical fields. Through all this part of the law may be felt the paradox that in this modern age we no longer have an acute sense of the unique importance of land and yet we are compelled to treat it at every turn as something quite different from anything else and to extend its mystic patronage to other kinds of interests by some kind of "privilege by association."

The difficulties of interpretation have not been made any easier by the fact that about one-third of the relevant decisions come from the common law side, in cases of ejectment, contract and landlord and tenant, the rest being equity decisions arising out of mortgages, settlements, wills and the interpretation of conveyances. That a coherent body of doctrine should emerge from such a process cannot be expected.

(1) *The Wills Act, 1837*

The Wills Act is an example of a survival of the old division into real and personal property, a division which lawyers fully understood. A decision will illustrate this. Section 1 of the Wills Act defined "real estate" as including "any estate, right or interest, other than a chattel interest, therein." It defined "personal estate" in the same section as including all property which went to the executor and not the heir. Chattels real clearly went with personal estate on both counts. In 1861 Lord Kingsdown's Act made certain changes in the law relating to wills of "personal estate" of British subjects. In *Re Lyne* [1919] 1 Ch. 90 the Court of Appeal was asked whether these applied to a bequest of an interest under a trust for sale of land. The court was able to cut the knot by pointing out that such an interest was personalty and went to the executor, and that Parliament meant the definitions of real and personal property to be mutually

exclusive; it held that the interest was personalty under the Act of 1861. Complicated arguments about such an interest being an interest in land were therefore beside the point. This decision is still valid (though such interests and real estate all pass to the executor thanks to the Land Transfer Act, 1897, and the Administration of Estates Act, 1925) since we can ascertain whether or not they would have passed to the executor before 1898.

(2) *The Statute of Frauds, 1677, s. 4 (now Law of Property Act, 1925, s. 40)*

The Statute of Frauds is interesting in its use by anticipation of very modern terminology. It required a written memorandum of contracts for the sale of "*land or any interest in or concerning land.*" As on most other points, it was left to the courts to elucidate its meaning. In *Evans* v. *Roberts* (1826) 5 B. & C. 829 there is a dictum of Littledale J. (at p. 839) that "land" meant freehold and "interest in land" meant a chattel real. There is no authority for this view and it was not the solution adopted by Parliament in section 1 of the Law of Property Act, where both freehold and leasehold corporeal interests are defined as "estates in land" and easements, mortgages and similar incumbrances as "interests in land." However the same rule was applied in *Driver* v. *Broad* [1893] 1 Q.B. 744 by the Court of Appeal. A limited company which owned a leasehold factory issued debentures. These charged the company's undertaking and property and provided that if the company attempted to charge its leasehold interest the debentures could at once be enforced and the principal sum secured by them would become repayable. A debenture holder orally agreed to sell the debenture. It was held that the Statute of Frauds applied, since the debenture constituted a charge on land and therefore was an interest in land. This decision appears still to be an authority since 1925. This type of case is remote from the ordinary routine of the conveyancing solicitor's practice, so no particular argument of convenience can be advanced for it. The only justification can be the "magic" or "mystic" effect of its indirect connection with the land owned by the company. The fact that a charge is "floating" would appear irrelevant. *Some* land may eventually be taken as security. This is borne out by *Horsey* v. *Graham* (1869) L.R. 5 C.P. 9. Graham promised orally to procure for Horsey a transfer of a lease of land belonging to Carlton. Graham had no kind of title to this land at the time. Yet it was held that, since a lease of land was the object of the transaction, section 4 of the Statute of Frauds applied.

Brett J. considered that "the primary and direct object of the agreement was an interest in land to be given to the plaintiff." The possibility of any equity or right to specific performance was excluded, it would seem, in such circumstances. In *Mounsey* v. *Rankin* (1885) 1 Cab. & E. 496 it was held that a contract to create a mortgage of land required a written memorandum (unless there was adequate part performance by deposit of title deeds affecting the legal estate). In *Gray* v. *Smith* (1889) 43 Ch.D. 208, G., S. and B. were partners in a firm which owned a lease. B. and S. agreed to retire and assign their shares to G. Kekewich J. held that such an agreement was caught by the statute, since they were in effect assigning shares of the lease. The Court of Appeal did not have to decide this point but expressed provisional approval. At that date, of course, you could own a legal estate in land in undivided shares, so there were no difficulties caused by the equitable doctrine of conversion. We come now to the important recent decision of *Cooper* v. *Critchley* [1955] Ch. 431, under the re-enacting section 40 of the Law of Property Act, 1925. Cooper and Critchley held a house as joint tenants at law, on trust for sale for themselves in undivided shares. Cooper was alleged to have agreed to sell his shares to Critchley. Most of the argument and of the judgments of the Court of Appeal turned on other points but there are clear dicta that a written memorandum would be needed. A number of cases on other subjects, *e.g.*, on the limitation of real actions and the statutory conversion of entails, were cited. Curiously, *Gray* v. *Smith* (*supra*) was not cited, possibly because the beneficial interests there were chattels real and not pure personalty. Nor was the *Rayleigh Weir* case (*infra*) though it would have been of some assistance to the court. Jenkins L.J. (p. 438) considered that the definition of "land" in the Law of Property Act, which specifically excludes an undivided share, which was the subject of sale here, did not necessarily apply. Admittedly, section 40 is part of the law of contract rather than that of property. The learned Lord Justice said that an undivided share was an interest in land, in the sense that it was a right to share in the proceeds of the land. He also stressed the effect of the sale, in leaving the purchaser, Critchley, sole owner of the land at law and in equity. (In the *Rayleigh Weir* case the purchaser was buying a fraction of the beneficial interests and the contract had no effect on the legal estate in the land but only on the interests in personalty behind the curtain of the trust for sale.)

The interesting recent developments in the law of occupational licences have not been without a bearing on this problem. So far,

none of the cases has directly raised the point. Somervell L.J. (as he then was) is the author of a clear dictum in *Errington* v. *Errington* [1952] 1 K.B. 290, that the occupation of the house by the daughter-in-law in that case was sufficient part performance to exclude section 40 of the Law of Property Act (at p. 294). It has also been pointed out that the licensee was only defending her rightful possession against a volunteer successor in title of the licensor, and not seeking specific performance of the option to purchase constituted by the terms of the licence—she was using it as a shield and not a sword (Sheridan, 17 *Conveyancer* 440, at 446).

(3) *The Real Property Limitation Act, 1833*

This statute defined "land" as including "*any share, estate or interest in corporeal hereditaments,*" a term referring to real estate. Section 8 of the Act of 1874 made special provision for money "*charged upon or payable out of land.*" In *Kirkland* v. *Peatfield* [1903] 1 K.B. 756 Wright J. held that money payable under a covenant to recover money secured by a mortgage of an interest in the proceeds of sale of land devised on trust for sale was charged on or payable out of land. With respect, this seems a very realistic solution, so far as section 8 is concerned. The learned judge considered the result would be the same even if the land had in fact already been sold. This decision does not really bear on the general problem of recovery of "land" in section 2 of the 1833 Act. In *Re Fox* [1913] 2 Ch. 75 an interest in the proceeds of sale of land was held to be an interest in land though itself personal property, a much less obvious proposition. The only authority for this holding was a ruling of the Court of Appeal, which had heard no argument on the point, in *Re Hazeldine's Trusts* [1908] 1 Ch. 34, at p. 38.

These cases are mentioned because they are still cited as authorities on the meaning of an "interest in land" (*Cooper* v. *Critchley*, *supra*). The law has, of course, changed in the field of real property limitation. The present statute is the Limitation Act, 1939, section 31 of which solves this particular problem by including in the definition of "land" any legal or equitable estate therein, including an interest in the proceeds of sale of land held on trust for sale. In any case the dichotomy of real and personal property, land and chattels, is largely eliminated by that Act. Thus an action to recover the principal of any mortgage on any form of property, real or personal, is now barred in 12 years (s. 18 (1)). The same term applies to the foreclosure of mortgages of land

(ss. 4 (3), 18 (4)) and of personalty (s. 18 (2)). The Act of 1939 is an example of the proper way to solve this problem. The assimilation of real and personal property in the field of mortgagee's remedies is especially apt, since, in equity, the mortgagee's interest, whatever the form of the security, has always been regarded as primarily a money debt (Waldock, *Law of Mortgages*, 2nd ed., 224), although the legislature confers on a mortgagee of "land," whether by demise or legal charge, a legal interest in the land (Law of Property Act, 1925, s. 1).

Since we shall be dealing with certain problems connected with undivided shares, it might be worth digressing to refer to the effect of the statutory trusts under Law of Property Act, 1925, s. 35, where land belongs to absolute owners jointly or in undivided shares. The legal estate is held on trust for all persons interested, incumbrancers being specifically referred to. Hence a mortgagee of an interest under a trust for sale, as in *Re Fox* (*supra*) will not now be barred, if the trust for sale is statutory, since a trustee cannot plead limitation where he holds or has taken trust property (*Re Milking Pail Farm* [1940] Ch. 996). This case was decided after the 1925 legislation but before the Act of 1939, but it is still valid now. It followed the decision of the Court of Appeal in *Re Landi* [1939] Ch. 828 where one of two joint tenants had been taking the entire income of a joint lease and it was held that he was liable to account to the other joint tenant without any limit of time, since their interest had attracted the statutory trust for sale under Law of Property Act, s. 35. This is a general decision, as all creations of concurrent absolute interests will attract the statutory trusts (Law of Property Act, ss. 34, 36).

(4) *Real Property Act, 1845, s. 6 (now Law of Property Act, 1925, s. 4 (2))*

The older statute provides that "*all interests in tenements and hereditaments* may be disposed of." Section 4 (2) of the Law of Property Act, 1925, now says that "*all rights and interests in land*" may be disposed of. As personal property is generally assignable also, this section has led to little litigation. The position of occupational licences is still open (Crane, 16 *Conveyancer* 342; Sheridan, 17 *Conveyancer* 457).

(5) *The Real Property Act, 1845, s. 5 (now Law of Property Act, 1925, s. 56)*

This statute provided that a person might take an *interest in tenements or hereditaments* or the benefit of any condition, right

of entry, covenant or agreement *over or respecting tenements or hereditaments*, although not named as a party to the conveyance or other instrument. The new section 56 refers to "*interest in land or other property*" and "covenants or agreements *respecting land or other property*," which extends the operation of the section to leases, which were not formerly hereditaments. It is well known that this provision does not extend to the ordinary law of contracts unconnected with land. How far this connection extends is not very clear. Much light has been thrown on the matter by the decision of Danckwerts J. in *Stromdale & Ball, Ltd.* v. *Burden* [1952] Ch. 223. In that case Mrs. Burden held an underlease which would expire in 1991. She further sublet to Dennison and Rosengrave jointly for three years. The sublessees wished to sell their business to the plaintiff company and asked Mrs. Burden to licence the assignment (although the facts as reported do not refer to any covenant against assignment). A formal deed of licence to assign was drawn up, including a covenant by Mrs. Burden to sell the residue of her own underlease to the plaintiff company on their request. The plaintiffs were not parties to this deed. Subsequently the sublessees assigned their tenancy to the plaintiffs. The learned judge held that the plaintiffs could enforce the option to acquire the underlease in reversion on their tenancy. It seemed clear that this covenant was fairly connected with land. "Respecting" is a very broad term. Much of the argument and judgment turned on a different point, which was irrelevant, as was pointed out in the judgment, namely, whether the burden of this option or the benefit of the option would run with the land. Here only the original parties (using section 56 to make the company one of them) were involved. The grant of an option to acquire a lease of land is certainly a matter which respects land, assuming, as we shall see to be justified later, that a lease or underlease is now an interest in land.

(6) *Real Estate Charges Act, 1854, s. 1*

The present law is contained in section 35 of the Administration of Estates Act, 1925, which provides that all forms of property bear their own charges, when devolving on death. At one time residuary personalty was chargeable with all incumbrances on property. Then Locke King's Acts were passed to make the heir or devisee of land discharge mortgages on the land, in relief of the personal property. These Acts did not at that time apply to specific bequests of personalty, which could still call on residue to pay off charges thereon. It therefore became vitally important to know whether the older legislation applied to a particular piece of

property. The Act of 1854 dealt with "*any estate or interest in land or other hereditaments.*" It was held in *Lewis* v. *Lewis* (1871) 13 Eq. 218 that where the testator was entitled to a share in the proceeds of a trust for sale of land and bequeathed it to John, John could call on the residuary legatee Anthony to pay off a mortgage on the share, as the share was personalty and not an interest in land. Malins V.-C. pointed out that there was no single universal test and admitted that it was a share in the produce of an estate in land (p. 226). This decision seems very appropriate, since the legislature seems really to have had "real property" in mind, rather than "land," as the sidenote confirms, referring to "real estate." It is the division between real and personal property which dominated the law of wills until 1926 and John was clearly a legatee of personalty. The problem was one of administration. There was no intimate contact with land in any physical shape or form. When a testator owned land and personalty and left both, as was common, on trust for sale, the courts did not regard that as throwing all charges onto the personalty, however, since it was land in the testator's hand (*Re Bennett* [1899] 1 Ch. 316; *Elliott* v. *Dearsley* (1880) 16 Ch.D. 322, 328 (C.A.)). In such cases the mortgages are generally charged on the land before the conversion by the trust for sale, and it would be unfair to sidestep the statutes because of the machinery of a trust for sale being used. In *Lewis* v. *Lewis* (*supra*) the mortgage was itself confined to the share under the trust for sale and had never been binding on the land. The question whether such an interest should be classified in the testator's hand or the legatee's is extremely interesting, but now irrelevant in view of the 1925 changes.

(7) *The Mortmain and Charitable Uses Act, 1891*

The policy of mortmain is fairly clear. The legislature has thought fit to prohibit the concentration of land in the hands of certain types of institutions and corporations, without restriction on their holdings of other forms of property. The Act of 1891, s. 3, defined land very clearly as tenements and hereditaments of any tenure but excluded "money secured on land or other personal estate arising from or connected with land." Leasehold interests, though apparently outside the Acts, are caught by them, since otherwise a long lease would be an obvious form of evasion (*Att.-Gen.* v. *Graves* (1752) Amb. 155; *Bunting* v. *Sargent* (1879) 13 Ch.D. 330; *Att.-Gen.* v. *Parsons* [1956] 2 W.L.R. 153 (H.L.)). Mortgages on land as security escape its operation. It is quite in order to give to a charity or similar body any amount from the proceeds of sale of land, since it becomes money before they

receive it, and, of course, they do not have the option to take it unconverted (*cf. Re Ryland* [1903] 1 Ch. 467). It is interesting to note, though now obsolete, that aliens could take proceeds of sale of land in the days when aliens were not permitted to own land in England (*Du Hourmelin* v. *Sheldon* (1839) 1 Beav. 79).

(8) *The Conveyancing Act, 1881, s. 6 (now Law of Property Act, 1925, s. 62)*

In order to reduce the length of conveyances, which spelled increased expense for the client, these statutes imply in conveyances of land a number of important "general words," which are especially important in the law of easements, though they are wide enough to assist a purchaser in cases of disputes over boundaries and the extent of land sold. The 1881 Act (s. 2 (ii)) referred to land of any tenure, as does the Law of Property Act, s. 205. In order to understand the meaning of a "conveyance" of land it has been found necessary to refer to another important block of sections, now sections 52 to 54 of the Law of Property Act, 1925, on which there has been little direct reported authority. Section 52 provides that a *conveyance of land or of any interest therein* must be by deed if it is to create a legal estate. It saves leases or other assurances not required by law to be in writing. Section 54 (2) saves leases for three years or less at the best obtainable rent. These may be created by word of mouth and are often created by writing not under seal. Section 53 provides that, subject to this and one or two other special cases, *no interest in land* can be created or disposed of except by writing. (The definition of "land" in this Act will be considered in a moment.) The operation of these sections is illustrated by two cases. In *Borman* v. *Griffith* [1930] 1 Ch. 493 a landlord in writing agreed to lease land to a tenant for seven years. This clearly fell outside the exception and did not satisfy the general rule. It operated as a good equitable tenancy but it was held that "conveyance" in section 62 refers to an assurance of the legal estate. There is little doubt that this is a proper result. "General words" have no place in contracts by correspondence but derive exclusively from the practice in drafting deeds. In *Wright* v. *Macadam* [1949] 2 K.B. 744 (C.A.) a tenancy for one year was granted in writing. This was held to come within the exception and to operate to pass a legal estate, *i.e.*, a term of one year. Section 62 was therefore applied in favour of the tenant. The definition of "conveyance" is so diffuse that this is probably the only solution, but it is a far cry from "general words." These were never, even in the palmiest days, used in short leases under hand.

(9) *The Law of Property Act, 1925, s. 1*

This important section has been left so late because it is a new provision and has had to be applied, as we have seen, to several situations created by earlier statutes, now mainly re-enacted in 1925. It severely reduced the possible number of legal estates in land. It is a section which every law student knows. Curiously enough it is a section which becomes more difficult to understand if studied more closely. "Land" is defined as "land of any tenure" (s. 205). A term of years is made a legal estate in land, although it was never a form of real estate before 1926 but only a "chattel real." The definition of "term of years" includes almost every conceivable thing, but does not, as such, refer to an underlease. Is a term of years itself land, so that a lease of it falls within the section? Commentators on the Acts have doubted that a term of years is land of any tenure, though this is probably a pedantic attitude. Direct authority is slight. In *Re Brooker* [1926] W.N. 93 counsel submitted that "land" included leaseholds. Lawrence J. accepted that it did, but no reasons are given in the very brief report. In *Re Trollope* [1927] 1 Ch. 596 Tomlin J. (at p. 601) referred to Lawrence J.'s holding and agreed with it, but again without explanation. Underleases are certainly treated as interests in land in the Law of Property Act, *e.g.*, the definitions of "lessor" and "lessee" include "underlessor" and "underlessee" (s. 205 (1) (xxiii)). Section 45 (3) refers, in connection with the Conditions of Sale, to "land held by underlease." Section 86 (2) refers to a subdemise of "leasehold land," as the proper form of mortgage of a lease. It is hardly arguable that leaseholds are not themselves land, or that an underlease is not itself a lease of land and therefore a legal estate.

This conversion of leasehold from personalty into "land" (but not into "real property" where that term is still a meaningful term of art) has had important consequences in the law of administration of estates. In *Re Brooker* (*supra*) it was held that the rule in *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137 would not apply to leaseholds left under an express trust for sale. "Land" includes "leaseholds" and special provision is made by section 28 (2) of the Law of Property Act that income of land before sale is to be treated as the income of the proceeds of sale. The exact object of this subsection is not clear. It is clearly convenient, since a trust for sale is often postponed for a very long time. Whether the legislature contemplated a change in the operation of equitable principles of apportionment is doubtful.

Where real property in the old sense, *e.g.*, freehold land, is

devised on trust for sale for persons in succession the rule in *Howe* v. *Lord Dartmouth* has never applied. The legatee of the proceeds has enjoyed the privilege of a landowner, because, until sale, he shares in the actual income of the land. His income is derived from the land and so he is interested in the land and has no claim to income or interest out of other assets. This was emphasised in *Re Woodhouse* [1941] Ch. 332. The result seems fair enough. It is supported by the notion that all devises of land are specific, whereas *Howe* v. *Lord Dartmouth* applies to residuary personalty only. A gift of a share in proceeds of sale of land is certainly not residuary. There is a tendency to take this line even if the land is devised in the form of a residuary gift. Landowner's privilege still clings fast. A common form is to give " all my land and the residue of my personalty," thus treating the devise of land, literally, as not residuary, though, logically, it may be so.

(10) *Law of Property Act, 1925, s. 34*

If the owner of a share in the proceeds of sale of land is treated as a landowner for the purposes of section 28 (2) *supra* he is in a very different position in other respects. Section 34 provides that it shall not be possible to create an undivided share in land, and the definition of land in the Act (section 205 (1) (ix)) excludes an undivided share in land. Joint tenancy of land is still possible at law but beneficial interests in joint tenancy will operate under a trust for sale, thanks to section 36, as do undivided shares under section 34. Only a joint tenant for life will still have a beneficial interest in land, and that is merely equitable, the legal estate being held in fee simple by the joint tenants. Joint tenancy for life is not very common in land now, so beneficial interests in land held concurrently will almost always operate as equitable interests in personal property, under some type of statutory trust for sale.

The long series of cases on conversion by the statutory trust for sale is well known, but it may be useful to refer to them briefly, from the point of view of the present article, and the statutory definitions. The leading case was the decision of the Court of Appeal in *Re Kempthorne* [1930] 1 Ch. 268 where the testator who owned an undivided share left all his " freehold and copyhold property " to X and it was held that this did not pass any interest in the proceeds of that property under the statutory trust for sale imposed by the Law of Property Act, ss. 34 and 35. All beneficial interests became pure personalty, the proceeds. This decision has been much criticised and it would not be unfair to say that it is now generally recognised as unfortunate, or as limited to the use of a

term of art with a very narrow meaning, *viz.*, "freehold." In *Re Newman* [1930] 2 Ch. 409 the testator left "all my share in . . . land." The statutory trust for sale converted this share into a share in the proceeds of sale. It was held that the devisee did not take these proceeds. They were clearly derived from and traceable to the share in land, but the testator "was devising real estate as such" (p. 413), "he uses language that can only be construed as a devise of real estate" (p. 417). This decision seems unnecessarily severe. It was possible to distinguish it in *Re Warren* [1932] 1 Ch. 42 where there had been a post-1925 codicil and Maugham J. held that the owners of shares in land were in much the same position as landowners, so far as beneficial interests were concerned. This was followed by Vaisey J. in *Re Harvey* [1947] Ch. 285. In that case a bequest was of "all my part or shares in the X estates and all other my lands at Y." This was held to pass fractional shares in such lands. The testator's intention is clear, and there is no invincible necessity to confiscate the bequests because he has not used unnatural language to distinguish them from devises of land properly so called. This later, and better, trend is confirmed by Harman J. in a valuable dictum in *Re Viscount Galway's Will Trusts* [1950] Ch. 1, at p. 9, where he says that "the owner of an undivided share in real estate still has an interest in the real estate under the statutory trusts for sale, which are, after all, only a conveyancing device." The duty of statutory trustees for sale to consult their beneficiaries, the right of beneficiaries to apply to the court to order delegation to them of the trustees' powers of management, the practical politics of a trust for sale of land, all confirm this opinion. It is reinforced by the common fact that the owner of a share is either himself one of the legal estate owners or is a person whose consent is a prerequisite of any sale under the terms of the settlement.

(11) *Land Charges Act, 1925, s. 10, and Law of Property Act, 1925, s. 199*

The Land Charges Act makes provision for the registration of several types of interest in land, *e.g.*, covenants or agreements entered into on a sale of freehold or leasehold land which are restrictive of the user of the land, and easements, rights or privileges over or affecting land. Although there are many cases in the law of easements and covenants it does not seem that any real difficulty arises in deciding whether they concern land or not. Nor has any difficulty arisen with regard to mortgages, charges or obligations affecting land. The position of the estate contract is not so clear. Section 10 of the Land Charges Act requires the registration

of contracts by estate owners to convey or create a legal estate, including valid options to purchase. We have seen that a contract may require a written memorandum if its object is the acquisition of an interest in land, even if the grantor or lessor does not yet own the interest of which he means to dispose. In *Sharp* v. *Coates* [1949] 1 K.B. 285 a purchaser, S., brought an action at common law to evict C. C. defended the action and the case was heard in the Court of Appeal by Goddard L.C.J. and Asquith and Singleton L.JJ. A weekly tenant of the land had granted C. an underlease from year to year with a proviso that if the tenant acquired a superior lease he would grant C. a lease for 10 years. In fact the tenant acquired the freehold title and then sold it to S. It was held that S. could evict C. C. should have registered the contract as an estate contract and, as he had not done so, it was void in favour of the purchaser, S. This ruling has two parts. In the first place the underlessor was an "estate owner" within the wording of section 10, because a weekly tenancy is a fraction of a yearly tenancy and therefore covered by the definition of a "term of years" in the Law of Property Act definition (s. 205). This is in line with the decision in *Wright* v. *Macadam* (*supra*) that a grant of a weekly tenancy is a conveyance of a legal estate. In the second place, the fact that the tenant had such a short interest in the land did not prevent his making a valid contract to grant C. a ten-year lease. In view of the result of the case this may not be important. C. was on the horns of a dilemma. If he had a personal contract, it was not binding on S. If it was an estate contract, he had failed to register it. A third possibility has been suggested, that there may be estate contracts binding by virtue of the doctrine of notice but not granted by estate owners (Rowley, 19 *Conveyancer*, p. 99) but before the doctrine of notice can apply there would surely have to be some definite link with an interest in land. Asquith L.J. saw the difficulty of allowing a weekly tenancy as the anchor by which to make the ten-year lease contract registrable. He pointed out that the promisor must have some interest in the land and saw no absurdity in the present case. I should agree with Mr. Rowley that that interest must have some relation to the interest contracted to be disposed of. Can a freeholder make an estate contract to grant a sub-underlease if he ever becomes his own undertenant? Does not the interest in land become something of a fetish or an Achilles' tendon without any logical connection with the estate contract itself? The same problem, of giving without having, was raised in *Coventry Building Society* v. *Jones* [1951] 1 All E.R. 901. This case is no longer law on the main

point at issue, the estoppel of a mortgagee by his debtor's tenancies. It appears still valid on the point of estate contracts. A purchaser of a house agreed to lease it to a weekly tenant. At that time the purchaser had an equitable right to the land, and he was entitled to have the legal estate conveyed to him, which made him an estate owner under section 10. The agreement was therefore void in favour of the mortgagee for want of registration. Now, of course, on taking possession, the tenant has a legal term and not a mere agreement (*Church of England Building Society* v. *Piskor* [1954] Ch. 554).

It may be objected that this has nothing to do with "land" but only with the distinction between law and equity. This is not quite true. In the first place Asquith L.J.'s reference to "any interest in land" shows that the division between legal and equitable ownership of the same interest is not always the test. In the second place much of the argument turned on section 14 of the Law of Property Act, 1925, which saves the *interest* of any person in possession or in actual occupation of *land* to which he may be entitled *in right of* such possession or occupation. It was held that this section, being limited to Part I of the Law of Property Act, had nothing to do with the duty to register land charges, enshrined in section 199. There is little authority on section 14. It is probably designed to protect the squatter who has acquired a new title by adverse possession. The courts are clearly disinclined to use it as a charter by which any person in possession (which includes receipt of rents and profits, under the definition in section 205 (1) (xix)) escapes the operation of the property legislation. It should be noted how it emphasises the "rights" of the person in occupation, so that if that person has acquired no legal title by his occupation he cannot possibly benefit from the mere fact of occupation. How he acquired that title is not indicated but is presumably now to be found in the Limitation Act, 1939. It will normally be a new freehold title, but in view of the technicalities of the law it may well be a leasehold title, *e.g.*, where the freeholder is not bound by a squatter's adverse possession against a tenant.

In *Re Rayleigh Weir Stadium* [1954] 1 W.L.R. 786, M and R were partners in a racing business which included a stadium vested in M. (It was held, as in the later case of *Bull* v. *Bull* [1955] 1 Q.B. 234 that this meant that M held the land on trust for sale.) It seems that M could have sold by himself to a purchaser without notice of the trust (see Vol. 19, p. 146). In fact both M and R entered into a contract to sell an eighth of the stadium to X. X registered this contract as an estate contract. M and R were

later adjudicated bankrupt. It was held that X had obtained no protection by the registration. The effect of the contract was not to make him legal owner of the stadium with M but to make him another owner of the proceeds of sale thereof under the trust for sale. An undivided share, as we have seen, cannot exist in land. Therefore the contract was a contract to deal with personal property and not one to create or convey a legal estate. The registration was consequently void. This decision is inevitable in view of the words of the Act.

A very interesting question to which there is as yet no solution is the position of an occupational licence. The point of registration was not raised, because there was no purchaser involved, in *Foster* v. *Robinson* [1951] 1 K.B. 149 (C.A.) or *Errington* v. *Errington* [1952] 1 Q.B. 290 (C.A.). There was an option to purchase in the latter case but no attempt was being made to enforce it. The mere right of a licensee to his licence, as such, could hardly satisfy the clear wording of section 10 of the Land Charges Act. In some cases there is no contract at all, and, even if there is, no one would pretend that a licence is a legal estate or interest in land. I should here agree with Mr. Sheridan's view (17 *Conveyancer* 440, at 467). Attempts to force the occupational licence into such alien classifications as the equitable easement or restrictive covenant would completely confuse the law and would break down the clear demarcations which exist between corporeal and incorporeal rights. This is not to say that there are not types of licences, *e.g.*, licences to erect aerials or put up posters or deposit refuse, which may not in some cases be good easements, and the line is always very difficult to draw in such cases, but this is an old problem. One of the weaknesses of the licence as a legal concept is its negative and residual character and lack of any necessary common elements.

(12) *Land Registration Act, 1925, s. 70 (1) (g)*

One of the overriding interests saved from the effects of registration of title is "The *rights* of every person in actual occupation of *land*." Two important cases in recent years have turned on the interpretation of this section. In *Woolwich Equitable Bldg. Socy.* v. *Marshall* [1952] Ch. 1 Marshall made an agreement on September 7, 1948, to lease part of a house to Long. On September 13, 1948, the house was conveyed to Marshall under a contract of sale. On the same day he executed a mortgage which excluded all power to lease. Long had gone into occupation on September 11, 1948. This case turned mainly on the feeding of the estoppel between Long and Marshall, by the acquisition of the legal estate by Marshall, and the consequence that the plaintiff

society as subsequent purchasers (mortgagees) were themselves bound. Danckwerts J., however, does not seem to have decided the case under section 70 (1) (k), the provision dealing with legal tenancies, but under section 70 (1) (g) which deals with persons occupying land. "By virtue of his occupancy he was an owner of an overriding interest" (p. 9). A similar decision is *Mornington Permanent Bldg. Socy.* v. *Kenway* [1953] Ch. 382. A purchaser agreed to lease a house to the defendant on February 4, 1949. The transfer of the legal estate to the landlord took place on February 9, 1949. A mortgage was executed on the same day. The main point of the case was "feeding the estoppel" but it was considered that the defendant also had an overriding interest. It is submitted that the feeding of the estoppel, turning the tenancies into legal estates, which are overriding under paragraph (k) is the true interpretation of these cases. It does not appear that the rulings on paragraph (g) are really very useful in this connection. Whether a person in occupation has "rights" must depend on some substantive rule of law and not on occupation by itself. This is an objection to the treatment of licensees of land as possessing overriding interests if they are in actual occupation. Have they any "rights" *vis-à-vis* a purchaser for value under the land registration system? If the courts decide that they have, *e.g.*, on the ground of actual notice of their claim by the purchaser, then paragraph (g) is a useful way of justifying this exception to the general policy of the Land Registration Act, and extending the principle from unregistered to registered conveyancing. It certainly ought not to give a licensee a greater protection than under the unregistered system, as the whole idea of registration is to enable purchasers to rely on what they see on the register.

(13) *Agricultural Holdings Act, 1923, s. 57 (now Agricultural Holdings Act, 1948, ss. 1, 94)*

These Acts do not deal with agricultural land but with agricultural tenancies, but they raise much the same problem. In *Ecclesiastical Commissioners* v. *National Provincial Bank* [1935] 1 K.B. 566 the bank had a charge on the farm tenant's stock. It was held that they did not rank as tenants for the purposes of suing the landlord for tenant-right under the Acts. Such a tenant must be an assign of the tenancy itself.

(14) *Rent Restriction Act, 1933, Sched.*

The powers of recovery of possession against a controlled tenant under the Rent Acts are further limited where the landlord has purchased "the dwelling house *or any interest therein.*" In

Powell v. *Cleland* [1948] 1 K.B. 262 the Court of Appeal decided that a man who took a lease of the house subject to the controlled tenancy was not such a purchaser, after consideration of the history of the relevant sections of the Acts. There are dicta in this case to the effect that a purchase of a share in a house would mean that the restrictions would apply to the purchaser. The argument that a lessee did obtain an interest in land under section 1 of the Law of Property Act, 1925, and that "purchaser" is defined in that Act to include a lessee was resisted by the Court of Appeal because the contexts in the two statutes were so different. Evershed L.J., as he then was, emphasised the difficulty of choosing between the various interpretations of these different sections in property statutes (p. 272). The Rent Act of 1933 might well have incorporated the Law of Property Act definitions, as was done with other statutes, but did not do so.

(15) *Defence Legislation*

Edwards v. *Hall* [1949] 1 All E.R. 352 is an example of a case which was decided after citation of rather different authorities and has been itself cited as an authority in still other cases. The 1939 Defence Regulations prohibited notice to the tenant after sale of an agricultural holding without certain consents. One of several common owners bought out his fellow owners. This was held not to be a sale of land for this purpose. "What the other tenants in common sold to the plaintiff was personalty." It is to be noted that the result was to leave the plaintiff sole legal owner, and that this type of transaction has been treated as a disposition of land in *Cooper* v. *Critchley* (*supra*). The only case cited in *Edwards* v. *Hall* was a decision on conversion under section 34 of the Law of Property Act, 1925.

(16) *Law of Property Act, 1925, ss. 78, 79, 141, 142*

The courts have always treated the test of whether a covenant so concerned land that it would "run" with it as basically the same for all three types of covenant, namely, the covenant between landlord and tenant at law, covenants on sale or assignment at law, and restrictive covenants (whether entered into on a sale or lease) in equity. Sections 78 and 79 which are concerned with the two latter types of covenant refer to covenants *relating* to any land, a very wide and general expression. There is a great body of case law on this subject but it is traditional in character and not largely based on statutory definitions. The older law appears to have been preserved intact by the statutory formulation. With certain

modifications the same is true of sections 141 and 142, which provide for the "running" of covenants between landlord and tenant. They use the term with "*reference to the subject-matter of the lease*," which seems to have been a re-enactment of the older term "*touching and concerning the land*." There is an abundance of case law on this subject and the test of whether a covenant does touch and concern land has not been altered by the 1925 legislation. Section 6 of the Law of Property Act simplifies the matter by specific provision that nothing in the new definitions of estates and incumbrances is to affect the binding force of covenants between landlord and tenant, and that they are not to be overridden by the exercise of statutory powers. The Land Registration Act, 1925, s. 23, also expressly preserves the validity of covenants and powers of re-entry. It would be fair to say that the landlord's right of entry is itself an overriding interest, within the definition in section 3 (xvi) of the Act, since section 70 does not pretend that its list of overriding interests is exhaustive. An assignee may buy a lease on the faith of entries on the register, only to find that the landlord has re-entered and ended the lease, and his right to indemnity under section 83 is dubious. He should have asked for recent receipts for rent, and the re-entry was an overriding interest, to which all registered land is deemed to be subject (s. 23 (1) (c)). Covenants between landlord and tenant are also outside the Land Charges Act, s. 10, by its express terms. Options to purchase are registrable but they do not "run."

BUYING TAX LOSSES

By Peter E. Whitworth, b.a., Barrister-at-Law

One of the more unexpected results of present taxation and company law is that losses can become a company's most valuable asset. Advertisements which seek to turn this asset to account are common enough, but the precise method of doing it is little understood and is full of pitfalls for the unwary. This may be one of the reasons why the practice did not suffer the same fate as "dividend stripping" in the last Budget.

The granting of income tax relief in respect of earlier losses merely recognises the need to allow for trading fluctuations in an individual business. To tax profits of good years and to ignore losses of bad ones would clearly be inequitable, even for income tax. Before 1926, profits were assessed to tax on the basis of a three-year average. Thereafter traders and professional men were allowed to set off losses of one year against the profits of the next succeeding six years. The Finance (No. 2) Act, 1945, in effect excluded the seven war years from counting towards the six-year time limit. In 1952 the time limit was removed altogether so that current losses can be carried forward indefinitely until absorbed by subsequent profits. Accordingly, no matter how great the loss, there is always a prospect of recovering the income tax on it. Moreover, if subsequent profits are large enough, profits tax relief can also be obtained. Since the combined rate of profits tax and income tax may be as much as 70 per cent., the value of a loss claim is considerable. However, in relation to profits tax, the provisions of section 32 of the Finance Act, 1951, directed against avoidance, must always be borne in mind.

The right to set off past losses against subsequent profits cannot be bought and sold as such. It is subject to two very important restrictions, *viz.*,

1. It is personal to the person who incurred the loss and can only be exercised in relation to a business carried on by him (*United Steel Companies Ltd.* v. *Cullington* (No. 2) [1940] A.C. 812, and Finance Act, 1953, s. 19 (1)).
2. It can only be utilised against the profits of the same business which incurred the losses (Income Tax Act, 1952, s. 342).

Thanks partly to *Saloman* v. *Saloman & Co. Ltd.* [1897] A.C. 22, where the loss is incurred by a company, restriction No. 1 is

easily overcome in practice. The company does not assign its right to loss relief; the shareholders simply assign their controlling interest in the company. The price paid for the shares will reflect *inter alia* the value which the parties put upon the right to carry forward losses.

Restriction No. 2 is less tractable. The new shareholders will probably bring new blood into the management and new activities into the company which will so change its fortunes that losses are succeeded by profits, with the intention that such profits shall enjoy virtual exemption from taxation until all past losses have been absorbed. A too drastic change may invite the Revenue objection that the company's business is no longer the same, *i.e.*, that restriction No. 2 applies. This is a question of fact to be answered after consideration of all the circumstances.

It would for instance be idle for a successful pork-pie manufacturer in the north of England to buy the shares of a company carrying on an unsuccessful smithy in the south, for the purposes of launching the company into pork-pie manufacture and setting off past smithy losses against the pork-pie profits. On the other hand, an able and industrious smith who acquired the shares and reinvigorated the smithy business to such effect that it made large profits, would have little difficulty in setting off the smithy losses against them. Between these two extremes there is an infinite number of cases where the line is difficult to draw, and where success depends on skilled negotiation and advocacy. That the matter is not entirely a question of fact is illustrated by the important case of *Goff* v. *Osborne & Co. (Sheffield) Ltd.* (1953), 34 T.C. 441, where the court held that there was no evidence to support a finding of the appeal Commissioners in favour of the taxpayer.

In general the interested purchaser will be a person who has the ability to make money in the precise line of trade in which the company has incurred losses. After acquiring the company he can arrange for it to be fed with profitable contracts.

Study of the cases directly or indirectly in point will indicate some of the things to be avoided if the scheme is to be successful, *i.e.*, if it is to be established that the business making the profits is identical with the one which incurred the losses. It is for instance fatal for the unsuccessful business to have been treated as permanently discontinued within the meaning of section 130 (1) of the Income Tax Act, 1952. No amount of resuscitation after that will bring the old business into existence again so far as loss relief is concerned.

Where a business has failed to make any profit for several years, the question whether it has been "permanently discontinued" may have been immaterial and therefore never decided. Moreover a temporary cessation of activities, as for the period of the war, is not normally treated as permanent discontinuance for section 130 purposes (see *Kirk and Randall Ltd.* v. *Dunn* (1924) 8 T.C. 633; *Merchiston Steamship Co. Ltd.* v. *Turner* [1910] 2 K.B. 923; *Gladstone Development Co. Ltd.* v. *Strick* (1948) 30 T.C. 131). Nevertheless, new business activities may defeat a subsequent claim that the business after the interruption is the same as the business which was interrupted (see *Goff* v. *Osborne & Co. (Sheffield) Ltd.* (1953), 34 T.C. 441). It may therefore pay a company to carry on trading at a loss in order to preserve the right to loss relief.

An amalgamation of the unsuccessful business with another business into a single business will almost inevitably defeat the claim to carry-forward of loss (see *George Humphries & Co.* v. *Cook* (1934) 19 T.C. 121 and *Goff* v. *Osborne & Co. (Sheffield) Ltd.*).

Again a drastic change in the character of the business will usually be fatal (*Morning Post Ltd.* v. *George* (1941) 23 T.C. s. 14; and see *O'Loan* v. *Noone & Co.* (1948) Irish Tax Cases, 71).

On the other hand, it is obvious that there are many changes in the detail of a business which would not prevent it from retaining its identity. In a case turning on the question of succession, *Laycock* v. *Freeman, Hardy and Willis Ltd.* [1939] 2 K.B. 1, Lord Greene M.R., at p. 8, made some helpful general observations. After saying that the owner of a business consisting of fifty retail shops may well close some of them, Lord Greene continued:

> ". . . he may make alterations in the goods that he sells, all sorts of alterations of that kind may take place; he may change his supplier, he may cut out a particular class of customer or a particular area. All questions of that kind appear to me to be really matters of fact for the determination of the Commissioners. . . . Changes of that kind may or may not be so substantial as to make it right to say, as a matter of fact (that would be a question for the Commissioners), that the business is not the same. . . . The differences may be so substantial as to justify a finding to that effect."

Supervening Liquidation

Greater difficulties arise where the company carrying on the unsuccessful business has already commenced liquidation. This

may happen because the advantages of turning the losses to account have not been realised, or because it was erroneously assumed that the liquidator could sell the loss relief claim like an ordinary asset.

Clearly if the liquidation proceeds, and the company is dissolved, there can be no hope of carrying forward losses. Liquidation once begun cannot be stayed without an application to the court. Moreover, unless the proposed purchaser of the shares is willing to see that all the creditors are paid off, then either all the creditors must consent to the scheme or the court's sanction must be obtained under section 206 of the Companies Act, 1948. There can be no scheme under section 206 unless at least a majority of the creditors representing not less than three quarters of the debts approve of it at a meeting summoned under section 206.

Apart from their nuisance value in being able to veto a scheme to preserve a tax loss claim, the creditors clearly have a moral right to share in the benefits from such a scheme since the loss claim is in a sense an asset of the company which ought to be realised for their benefit. Moreover, in so far as they are ordinary trade creditors, their debts have gone to swell the company's loss, despite the fact that those debts have not been paid. Accordingly if the proposed buyer of the company's shares is to preserve the tax loss claim, it is right that he should put the liquidator in funds to pay some proportion of the debts. The amount of such proportion will be a matter for negotiation.

The normal procedure will be for the purchaser of the shares to advance the money on loan to the company. Purchasing the creditors' debts direct would probably be fatal to a scheme under section 206, since the compromise between the company as such and its creditors, required by that section, would be lacking. Moreover, the purchase would attract *ad valorem* stamp duty at 2 per cent. of the consideration.

If the purchaser contracts under seal with the company to advance a stated amount for payment to its creditors the contract will attract *ad valorem* stamp duty thereon at 5s. per cent. (Stamp Act, 1891, Sch. Heading, Mortgage (1)).

When the petition to sanction the scheme under section 206 is before the court, the court may require from the proposed purchaser of the shares an undertaking to advance the money which he has already contracted to advance. A similar requirement may be imposed where there is merely a summons to stay the winding up.

Liquidation as affecting business continuance

Stay of the winding-up proceedings, with or without a section

206 scheme, will prevent the company from ceasing to exist, but it will not of itself ensure that the company's business continues in identical form. As already indicated, the continuance of a business is a question of fact, but supervening winding up makes the task of the taxpayer a little more difficult.

A liquidator cannot carry on his company's business except so far as is necessary for its beneficial winding up (Companies Act, 1948, sections 245 (1) (b) and 303 (1) (b)). Accordingly there is a tendency towards a prima facie presumption that a liquidator is not continuing the company's business (see *C. I. R.* v. *Old Bushmills Distillery Co. Ltd.* [1928] N.I. 56; 12 T.C. 1148 and *Wilson Box (Foreign Rights) Ltd.* v. *Brice* [1936] 3 All E.R. 728). This presumption can of course be rebutted on the facts (see *Re Beni Felkai Mining Co. Ltd.* [1934] Ch. 406 and *Baker* v. *Cook* [1937] 3 All E.R. 509).

However, even where the company is held to be trading through its liquidator, there may be grounds for saying that, as a result of winding up, the trade now carried on is not the same as the company's former trade. There must of course be some change in the business itself; it would not be open to the Revenue to say that the liquidator as such had succeeded to the company's trade so as to constitute a "change in the persons engaged in carrying on" the trade, within section 19 of the Finance Act, 1953. The Companies Act, 1948, s. 281, makes it clear that it is the company, not the liquidator, which carries on the business. There is judicial authority for the proposition that the appointment of a receiver and manager by the debenture holders does not constitute a change in the person carrying on the company's business (*C. I. R.* v. *Thompson* [1937] 1 K.B. 290).

Farming

In the case of farming, the scope for turning past losses to account seems to be somewhat wider than with other businesses. This is because of section 152 of the Income Tax Act, 1952, which provides as follows:—

> "152. All the farming carried on by any particular person or partnership or body of persons shall be treated as one trade, and he or they shall be assessable and chargeable in respect of the profits or gains thereof in any of the divisions in which any part of his or their farm land is situated:
>
> Provided that nothing in this section shall limit any right to make any assessment and charge in the place of ordinary residence."

Section 152 is a machinery section designed to remove possible assessing difficulties where a farmer's land is scattered about in different income tax divisions. It would be absurd to treat the activities on each particular piece of land as a separate trade for tax purposes. Nevertheless, although the section is designed to facilitate the administration, it does incidentally affect the substantive law of tax liability. On a strict construction it appears to be confined to cases where farming is carried on simultaneously on different pieces of land. In practice, however, where a farmer moves from one farm to another, he is treated, on the authority of section 152, as carrying on one continuing trade. If he can show a great difference between the old and the new farms he is allowed to claim that one trade has ceased and has been succeeded by an entirely new trade. It may pay him to do this where his profits fall owing to the repercussions on the basis of assessment, but he would of course sacrifice any right he had to carry forward losses. Where "new trade" treatment is not claimed, it seems that the Revenue do not in general seek to impose it. If the farmer took the precaution of beginning to farm at the new farm before ceasing to farm at the old one, then his right to section 152 treatment would be more firmly established.

It follows that where a company has been farming at a loss, it may be able to turn those losses to account by setting them off against the profits of an entirely different farm which it takes over in some distant part of the country. Its shares are on that account all the more valuable.

Admissions by the Tax Inspector

Advertisements by and for companies with losses usually refer to "agreed" losses. A company may incur losses without being able to induce the tax inspector to agree that the losses are allowable. Computations of allowable loss should have been agreed with the inspector before negotiations are even started.

Again where there has been some interruption or change in the company's business activities or liquidation has begun it may be possible to obtain the inspector's agreement that so far the business continues in identical form.

Neither of these matters are matters of estoppel against the inspector but their value is nonetheless considerable. Without some sort of informal official guarantee the purchaser may find he has bought nothing but expensive litigation.

PREPARING A SCOTT OR REFEREE'S SCHEDULE (*a*)

By Donald Keating, Barrister-at-Law

The document known variously as a Scott or Scott's or Referee's or Official Referee's Schedule (*b*) is frequently employed in building contract disputes and in dilapidations cases. It may sometimes be appropriate in other types of detailed disputes over fact. It usually comes into existence as the result of an order made upon the summons for directions and it may originate in substitution for or as part of the pleadings, *e.g.*, as a defence to a claim or counterclaim, or it may be a separate document prepared after the pleadings are closed for the assistance of the court or arbitrator.

The object of a Scott Schedule is to define and state the issues clearly by assembling all the relevant allegations and admissions in tabular form. If carefully drawn, it will prevent confusion arising from the necessity of referring to two or three documents in respect of one matter of detail, and it will save valuable time and energy at trial. Moreover, when it has been completed the parties may find that over a large number of small issues there is so little difference between them that they can be settled, thus reducing the dispute to a few substantial matters.

The drafting of the contents of the schedule must depend upon the circumstances and the excellence or otherwise of the report of the expert witness. Whatever the skill of the lawyer who finally settles the schedule, it will not be a good schedule if the report is bad. Knowing this, the solicitor who instructs the expert to report should instruct him to prepare his report in tabular form as if for a Scott Schedule. In this way the eventual drafting of the schedule will be made easier, and the discipline of the tabular form for each item will make it less likely that the expert will overlook any item or his comments upon an item. When the report is received it should be immediately checked by the solicitor and generalisations such as "poor workmanship" must not be accepted. The expert must be told to specify exactly what his

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(*a*) This article is based on a section of the writer's book on "Building Contracts" published by Sweet & Maxwell Ltd. Before publication of the book Sir Tom Eastham, Q.C., formerly senior Official Referee of the Supreme Court was kind enough to read through and criticise the section. The writer is greatly indebted to the firm of Montagu Evans & Son for their assistance in the preparation for this article of the examples of typical contents of Scott Schedules set out below.

(*b*) Hereinafter called a "Scott Schedule."

complaints are and how they apply to each item. If this would involve a repetition of several complaints about each of many items, the complaints can be set out in full for the first item and thereafter one of two methods adopted. The first is to say "Defects as in No. 1." The second is to devise a code for each complaint, *e.g.*, "insufficient rubbing down—I.R-D." The latter course is usually preferable as tending towards greater accuracy, but the number of code terms must be strictly limited or confusion results and the object of the schedule is defeated.

There is no set form prescribed by the rules for the headings to the Scott Schedule, but the forms suggested below should be found adequate for most types of building contract disputes. They can, if necessary, be adapted in accordance with common sense in order to present the issues in any particular case as clearly and conveniently as possible. It is often desirable for the headings of the various columns to be settled before the official referee at the hearing of the summons for directions (*c*). The parties can then explain what the issues are and suggest the appropriate headings; in the case of differences the official referee can determine what they should be.

In preparing a Scott Schedule brief paper should be used lengthwise.

Form 1. Defects alleged by employer

See specimen, *post*, p. 39.

Notes

Generally. This form is suited to a dispute arising out of a lump sum contract where there has been substantial completion, and the defendant (the employer) admits the claim subject to his counterclaim or set-off for defects and omissions (*d*). The defendant will normally draft the first four columns and then submit the schedule to the plaintiff (the contractor) for his comments. Alternatively if the plaintiff has already delivered a reply dealing with the defendant's particulars the defendant can set out the relevant parts of the reply in column 5.

Column 1. Serial numbers should be inserted here for reference purposes. If items in the specification are numbered the item number should appear in column 2.

(*c*) There is no summons for directions as such in an arbitration, but a preliminary meeting between the arbitrator and the legal representatives of the parties is often arranged to settle the issues and deal with the matters usually dealt with on a summons for directions.

(*d*) See *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176, 181, C.A.

Column 2. This sets out what the employer alleges should have been done to comply with the contract. If the contract is to do work according to a specification or bills of quantities it should refer to the relevant item; if the work is a variation it should state what ought to have been done as a variation giving particulars both of the original work and of any variation order. If the quality of the work was not specified it should set out what ought to have been done in order to complete the work in a good and workmanlike manner.

Column 3. This sets out the defects alleged.

Column 4. This column sets out the amount of the defendant's claim. In the ordinary lump sum contract the measure of his claim is the difference in value between the work as done and the work as it should have been done to comply with the contract, and this is usually calculated by the cost of rectification, *i.e.*, the cost of making the defective work correspond with the quality and quantity of work required by the contract (*e*). If all the items are calculated on this basis the headings of Columns 4 and 6 can be altered to "Cost to Rectify." There may be cases in which in the circumstances the cost of rectification would be so great in comparison with the nature of the defect that a reasonable employer would be satisfied with the work as done plus damages for the difference in value between the whole contract works (*f*) with the defects, and what their value would have been without the defects (*g*). In such cases it is advisable to write "diminution of value" or otherwise to indicate that the cost of rectification is not being claimed. In cases where there is doubt about the principle by which the defendant's claim will be calculated Column 4 can be subdivided and figures inserted in each subdivision, it being stated that the lesser sum is claimed as an alternative.

Column 5. In this column the plaintiff sets up his defence to the claim admitting, not admitting, or denying the allegations of defects or raising an objection in point of law. He may admit that the work was carried out as alleged, but say that it was done in pursuance of a variation order, giving particulars, or he may plead an architect's final certificate, or waiver or some special defence under the contract (*h*). If such a plea has been set out

(*e*) *Hoenig* v. *Isaacs* (*supra*); *Dakin* v. *Lee* [1916] 1 K.B. 566, C.A.

(*f*) *i.e.*, the house or whatever else was being built.

(*g*) There is no direct authority for this proposition but it is implicit, it is submitted, in *Dakin* v. *Lee* (*supra*) and *Hoenig* v. *Isaacs* (*supra*), and can be supported by reference to the principle of mitigation of damages and by analogy with the measure of damages payable by a tenant to his landlord for breach of a covenant to repair (see Woodfall on *Landord and Tenant*, 25th ed., p. 784, para. 1753).

(*h*) Such a defence may be suitable for hearing as a preliminary point of law.

in full earlier in the schedule or in the body of the pleadings it is sufficient to refer back.

Column 6. Upon ordinary principles of pleading the plaintiff need insert nothing in this column (*i*). In practice a sum is frequently inserted although there may have been a denial of liability in the previous column, the effect being of a plea in the alternative that, "if, which is denied, the plaintiff is liable, the amount recoverable is £x." The advantage of this course is that it shows to what extent the parties are at issue over damages.

Columns 7 *and* 8. These columns are inserted for the use of the referee.

Form 2. Defects alleged: third parties or more than one defendant

The form will be as Form 1, save that special directions may have been given by the court (*j*), and extra columns must usually be added for each party interested in the allegations. In some cases it may be unnecessary to insert a column for a particular party. This may arise where, for example, a main contractor has made it clear that he will at trial confine himself to the issue of a claim for an indemnity or contribution from a sub-contractor who has carried out the allegedly defective work. In such a case the main contractor and the sub-contractor may have agreed between themselves, with a view to saving costs, that only the latter should plead to the defects and call evidence about the defects.

Form 3. Extras: claim by contractor

See specimen, *post*, p. 41.

Notes

Generally. This form is suitable for a dispute where the contractor is the plaintiff and has issued a claim for extras, and he will normally first draft columns 1–4 (*k*).

Column 2. This sets out the work alleged to have been done.

Column 3. This deals by way of reply with any special defence raised in the pleadings such as absence of an order, or of an order in writing, giving where appropriate particulars of the order or other matters relied on. It may also deal by way of reply with any allegations of defective work raised by the defendant (see below).

Column 5. The defendant (employer) sets up his defence in

(*i*) See Ord. 21, r. 4.
(*j*) See Ord. 16A, r. 7 (1).
(*k*) Subject to these special notes the notes to Form 1 apply with the necessary modifications.

the usual way giving particulars of any defects upon which he relies by way of set-off in diminution of the price claimed.

Counterclaim. If the defendant has a counterclaim he should, after completing Columns 5 and 6, prepare a separate schedule headed "Counterclaim." This will be as in Form 1 save that the serial numbers will be continued from the schedule for the claim. The plaintiff will complete the counterclaim schedule in the usual way.

Form 4. Reasonable sum: claim by contractor

Form 3 can be adapted by heading Column 2 "Work carried out." The content of the columns will vary considerably according to the nature of the issues; thus the amount of the work may be agreed, the only dispute being the pricing, in which case Column 2 may consist of summaries of costs, *e.g.*, "Plasterer: 24 hrs. at 3/8d. per hour."

Form 5. Schedule contract: claim by contractor

Notes

Form 3 can be adapted. In Column 3 the contractor should state which part of the contract schedule he relies on. If it provides for varying percentage additions, as in the National Schedule of Daywork Charges (*l*), Columns 3 and 4 can be adapted.

See specimen, *post*, p. 42.

It will be a question in each case whether the defendant's columns should be correspondingly adapted, or whether it is sufficient for the defendant to set out his allegations as comments and the amount he considers should be paid under "price."

In many cases the official referee may direct that a formal Scott Schedule is unnecessary and that it is sufficient if the plaintiff supplies lists of labour and materials (see below).

Cost plus profit contract

In a cost plus profit contract where the only issue is the amount claimed by the contractor a Scott Schedule is unnecessary unless its preparation has been directed by the official referee or the arbitrator. All that is normally required are two lists:—

(i) A clear summary of the time sheets showing the time spent by each class of labour or by each workman, showing the rates actually paid, insurances, etc.

(ii) A list of materials used upon the work setting out the actual cost; giving references to invoices, receipts and other documents.

(*l*) Issued by the Royal Institution of Chartered Surveyors and the National Federation of Building Trades Employers.

FORM 1. Defects alleged by employer

Serial No.	Contract Work	Defendant's		Plaintiff's		Referee's comments	
		Comments	Estimate of loss	Comments	Estimate of loss		
1	2	3	4	5	6	7	8
1.	Items 13–14 in the Specification:— The concrete foundations to the external walls are to have a width of 2′ 3″ and a thickness of not less than 9 inches.	The foundations do not comply with the Specification. The width is only 1′ 6″ instead of 2′ 3″. The thickness of the foundations varies from 6 inches to 8 inches.	Cost to Rectify:— £185 alternatively Diminution of Value:— £60	It is admitted that the concrete foundations are 1′ 6″ wide, but there is no loss in value as a width of 1′ 6″ for foundations to this building in the particular subsoil is adequate and complies with the Local Building By-laws. It is denied that the thickness of the concrete is less than the Specification requires. The average thickness is at least 9 inches.	Nil or £45		
2.	The Preamble to the "Joiner" section of the Bill of Quantities states that all wood shall be well seasoned and that any joinery which shows shrinkage or distortion within 6 months of completion shall be replaced	Shortly after fixing, and within 6 months of completion 3 internal doors, and 4 wood casement sashes showed severe shrinkage, causing the joints to open up, and distortion to occur which prevented proper	Cost to Rectify:— £38	The wood was well seasoned. It is admitted that some slight shrinkage has taken place but it did not warrant the replacement of the joinery. The Plaintiff repaired the defects so that all doors and windows fitted	Nil or £5		

FORM 1. Defects alleged by employer—*continued*

Serial No.	Contract Work	Defendant's		Plaintiff's		Referee's comments	
		Comments	Estimate of loss	Comments	Estimate of loss		
1	2	3	4	5	6	7	8
	at the Contractor's expense.	fitting, and made them difficult to close. The Architect on or about April 4, 1955 orally instructed the Plaintiff to renew these doors and sashes. The Plaintiff failed to do so.		properly and closed properly. The Defendant has suffered no loss or alternatively a small diminution in value.			
3.	Item 41 in the Specification requires Stock bricks to be used throughout, for all walls and partitions.	The Plaintiff used Fletton bricks for the internal partitions and all hidden brickwork to the main walls. Stock bricks were only used for facing the external walls. This causes a loss in value as Stock bricks are more durable, particularly for brickwork below ground level. Fletton bricks are cheaper, but the Plaintiff has not shown a deduction in his account.	Diminution of Value £280	Fletton bricks were not used as alleged. They were used only for two courses in the partition wall between kitchen and living room and for part of three courses of the front main wall.	£10		

FORM 3. Extras claimed by contractor

Serial No.	Extra work carried out	Plaintiff's		Defendant's		Referee's comments	
		Comments	Price	Comments	Price		
1	2	3	4	5	6	7	8
1.	Take down and renew 40 yards super of ceiling plaster.	The Plaintiff's estimate of £140 for item "renew ceiling plaster where necessary" was provisional only and related to 140 yards super. When carrying out the work it was found to be necessary to renew a further 40 yards super.	£40	If which is denied the work claimed for or any of it was carried out the said work was not extra work but was included in the contract price.	Nil		
2.	The small flat roof over the Back Addition of the building was covered with copper instead of zinc as stated in the Specification.	The Plaintiff on or about April 5, 1955, orally suggested to the Defendant that owing to difficulty in obtaining the heavy gauge of zinc required he might use copper. The Defendant orally agreed.	£30	The Defendant allowed the Plaintiff to use copper instead of zinc, but was informed by the Plaintiff that the extra cost would not be very great. He is willing to pay a reasonable sum. The sum claimed is excessive and unreasonable.	£15		

FORM 5. Schedule contract: claim by contractor

Comments		Plaintiff's Net cost	Percentage increase	Price claimed
3		4	5	6
	£ s. d.			
Work involved in Variation Order No. 5				
Bricklayer 22 hours @ 4s. 1½d.	4 10 9			
Labourer 25 ,, @ 3s. 7½d.	4 10 7½			
		£9 1s. 4½d. (Labour)	33⅓%	£12 1s. 10d.
900 Bricks @ £13 18s. per 1000	12 10 0			
1 cwt. Cement @ 7s. 1d.	7 1			
¼ yd. cube of Sand @ 36s.	9 0			
		£13 6s. 1d. (Materials)	10%	£14 12s. 8d.

THE EFFECT OF SECTION 56 (1) OF THE LAW OF PROPERTY ACT, 1925

By D. W. Elliott, ll.b., Solicitor

Section 56 (1) of the Law of Property Act, 1925 (*a*), provides that:

> "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

The precise meaning of this provision has been the subject of acute controversy. On the one hand, it has been said that it has largely abrogated the common law rule that, subject to certain limited exceptions, no one can sue on a contract to which he was not a party (*b*). On the other hand, the view has been expressed that the abrogation of that rule would constitute such a radical change in the English law of contract that it cannot have been the intention of the legislature to do so by a side wind, so to speak, and in what is after all a piece of property legislation (*c*).

This, in turn, has produced another controversy as to whether the rule alleged to have been abrogated really was as fundamental as has been suggested, notably by Viscount Haldane in *Dunlop* v. *Selfridge & Co.* (*d*). According to Denning L.J. "That rule is not nearly so fundamental as it is sometimes supposed to be" (*e*), and his thesis is that it did not exist prior to 1861 when it was introduced into the law by *Tweddle* v. *Atkinson* (*f*). He cites several cases in support of this contention (*g*), but almost as many

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(*a*) 15 Geo. 5, c. 20.

(*b*) "I can think of no words more apt to do away with the rule in *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393 leaving the courts free in cases respecting property to go back to the old common law whereby a third party can sue on a contract made expressly for his benefit": *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* [1953] 2 All E.R. 1475, *per* Denning L.J. at p. 1483.

(*c*) "I am not prepared to hold that s. 56 has created such an enormous change in the law of contract": *Re Foster* (1938) 159 L.T. 279, *per* Crossman J. at p. 282: see also Farwell J. *Re Sinclair's Life Policy* [1938] Ch. 799, at p. 804.

(*d*) [1915] A.C. 847, at p. 853.

(*e*) *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, at p. 514.

(*f*) (1861) 1 B. & S. 393.

(*g*) *Drive Yourself Hire Co. Ltd.* v. *Strutt*, *supra*, at p. 1482.

can be and have been used (*h*) to maintain the contrary view that the doctrine of privity of contract is and has been for the last three hundred years of first importance in the law of contract.

It is not intended to enter into this controversy, but rather to concentrate on the interpretation which has been placed on the section by cases since 1925. It can be argued with some force that the antecedent law is of assistance in the interpretation of a statute only where the statutory words are ambiguous or lead to absurdity. The complaint against section 56 (1) is not that it is ambiguous or leads to absurdity, but that if literally interpreted it leads to a change in the law more radical, so it is surmised, than could have been contemplated by the legislature. While it is questionable how far this objection justifies a restrictive interpretation being placed on the section by the judiciary, the fact is that the judges have said—to use the words of one of them—that "a reasonable construction must be put on the section" (*i*). It is the purpose of this article to discover how far they have matched their words with deeds, and whether the actual decisions in cases have emasculated section 56 (1) to quite the extent which might appear to one who was acquainted only with some of the more sweeping dicta in the cases.

In the eighteenth century Buller J. said: "If one person makes a promise to another for the benefit of a third, that third person may maintain an action on it" (*j*). Whether or not this statement accurately represented the common law prior to 1861 (and Denning L.J. (*k*) thinks it did), it is submitted that such a rule has existed since 1925 subject only to the provisos that the promise must concern "property" in the wide sense in which that word is used in the Law of Property Act (*l*) and that the promise must be in a written instrument of some sort. That a rule in these or similar terms is thought desirable appears from a perusal of the Sixth Interim Report of the Law Revision Committee (*m*).

Before reviewing the cases in which the section has been considered, it may be as well to deal first with section 56's predecessor on the Statute-book, and second with one general objection which is sometimes made against giving section 56 anything other than a very restricted interpretation.

(*h*) 70 L.Q.R., p. 467.
(*i*) Farwell J. in *Re Sinclair's Life Policy* [1938] Ch., at p. 804.
(*j*) *Marchington* v. *Vernon* (1787) 1 Bos, & P. 101n.
(*k*) *Drive Yourself Hire Co. Ltd.* v. *Strutt* [1953] 2 All E.R. 1475, at 1482.
(*l*) 15 Geo. 5, c. 20, s. 205 (1) (xx).
(*m*) [1937] W.N. 291, 294. The Committee thought that the extent of the operation of s. 56 was doubtful.

Section 56 (1) follows and extends section 5 of the Real Property Act, 1845 (*n*), which provides as follows:

> Under an Indenture, executed after the First day of October One thousand eight hundred and forty-five an Immediate Estate or Interest, in any Tenements or Hereditaments, and the Benefit of a Condition or Covenant, respecting any Tenements or Hereditaments, may be taken, although the Taker thereof be not named a Party to the same Indenture.

Section 5 was soon given a limited interpretation by the courts. In *Kelsey* v. *Dodd* (*o*) Sir George Jessel M.R. held that a person not in existence at the date of a covenant could not possibly claim to be a covenantee by virtue of the section; and in *Forster* v. *Elvet Colliery* (*p*) it was held that the section only applied to covenants which ran with the land, and the House of Lords, with some hesitation, confirmed this (*q*).

In view of the fact that the section was in terms limited to real property and to deeds it would seem obvious that no greater effect can be claimed for the provision than that it got round the old common law technical rule that a person could not take an immediate interest in land under an indenture *inter partes* unless he was one of the parties.

But the legislature returned to the subject with section 56 (1) and used words which, as was pointed out by Luxmoore J. (*r*), "enlarged the scope of the earlier words, for it [the section] extends the rights of a person not a party to a deed to covenants affecting every kind of property, personal as well as real." Luxmoore J. went on to say that the limitation laid down in *Forster* v. *Elvet Colliery* (*s*) restricting section 5's application to covenants which run with the land, cannot apply to section 56, at any rate so far as personalty other than leaseholds is concerned, because there are no covenants which run with pure personalty at common law (*t*).

One criticism which has been raised by those who oppose giving the section its literal meaning is that to do so will produce a crop of unmeritorious claims. In *White* v. *Bijou Mansions* (*u*) Simonds J., after holding that the section must be given a limited operation, says:

(*n*) 8 & 9 Vict. c. 109.
(*o*) (1883) 52 L.J.Ch. 34, at p. 39.
(*p*) [1908] 1 K.B. 629.
(*q*) *Sub nom. Dyson* v. *Forster* [1909] A.C. 98.
(*r*) *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430, at p. 438.
(*s*) *Supra.*
(*t*) *Re Ecclesiastical Commissioners for England's Conveyance, supra.*
(*u*) [1937] Ch. 610.

> "To give it any other meaning appears to me to open the door to claims or assertion of rights which cannot have been contemplated by the legislature, for if that be not the limitation which must be imposed on this section it appears to me that there is no limit and it will be open to anybody to come into court and say, 'Here is a covenant which if enforced will redound to my advantage, therefore I claim the benefit of the section. I claim that this covenant or condition is one which should be enforced in my favour because it is for my benefit, whether intended for my benefit or not intended for my benefit, would not appear to matter.' I cannot give the section any such meaning as that" (*v*).

The limitation which his Lordship suggests must be placed on the section is that "only that person can call it in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant something, or with whom some agreement or covenant is purported to be made" (*w*).

This suggested limitation, which has been approved several times (*a*), is, one may say with respect, a sensible one and in accord with what Buller J. and Denning L.J. thought was the old common law rule, provided it is not too narrowly interpreted. However, the dictum seems usually to have been construed to mean that unless the third party is expressly named as covenantee, or the covenant is expressed to be made with him, then he is not a person "with whom some agreement or covenant is purported to be made." In *Re Foster* (*b*), in a policy on the life of a son taken out by a father, the son or his assigns were expressed to be the person to whom the policy money was to be payable. Nevertheless Crossman J., after quoting Simonds J.'s test, said (*c*), "In my judgment, section 56 does not apply to the present case because the representatives of [the son] are not, in my opinion, and on the true construction of the document, the persons to whom the policy purported to grant the legal right to receive the policy money or with whom a contract to pay the policy money is made by the policy." And in *Re Miller's Agreement* (*d*) Wynn-Parry J.

(*v*) *Ibid.*, at p. 625.
(*w*) *Ibid.*
(*a*) *Re Foster* (1938) 159 L.T. 279; *Re Sinclair's Life Policy* [1938] Ch. 799; *Stromdale & Ball Ltd.* v. *Burden* [1952] Ch. 223; *Re Miller's Agreement* [1947] Ch. 615.
(*b*) (1938) 159 L.T. 279.
(*c*) At p. 282.
(*d*) [1947] Ch. 615.

construed a deed of covenant, and finding that the document did not in terms purport to grant to the third party beneficiaries any right to sue, nor contain some agreement or covenant with them, applied Simonds J.'s test and held that the section could not possibly be applicable.

That this is the wrong way to interpret Simonds J.'s words is shown by *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* (*e*). In argument before the Court of Appeal, the objection was taken that section 56 could not be relied upon by the third party because the covenant in question was not formally expressed to be " with " him. Somervell L.J. pointed out in the course of argument that this was too narrow an interpretation to be placed on Simonds J.'s dictum, and Denning L.J. (*f*) said that a covenant is sufficiently made " with " a person if it is, on the face of it, made directly for his benefit in such circumstances that it was intended to be enforceable by him. In *Stromdale & Ball Ltd.* v. *Burden* (*g*) where A covenanted with B (his tenant) that if C (B's proposed assignee) so desired, A would assign his interest in the reversion to C, Danckwerts J. held that this was sufficiently made *with* C. And in *White* v. *Bijou Mansions* itself, on appeal (*h*), the dictum of Greene M.R. at p. 365 which is usually bracketed with Simonds J.'s dictum as being identical with it, really lays down a much more lenient test of who is entitled to use section 56: " Whatever else section 56 may mean it is . . . confined to cases where the person seeking to take advantage of it is a person . . . who falls within the scope and benefit of the covenant according to the true construction of the deed in question."

So interpreted, Simonds J.'s limitation is no greater than the one found on the alleged common law rule—not even the most violent of the critics of the doctrine of privity of contract would suggest that *any* third party could sue on *any* contract—it must have been made for his benefit (*i*). The requirement that a plaintiff must show that the contract was made for his benefit should disarm most objectors to section 56 by excluding " all those persons who might like to avail themselves of the covenant and say 'If we can take advantage of this, it will be for our benefit.' " (*j*).

The cases on this section which it is now proposed to review fall into two classes: cases concerned with land on the one

(*e*) [1953] 2 All E.R. 1475.
(*f*) *Ibid.*, at p. 1481.
(*g*) [1952] Ch. 223.
(*h*) [1938] Ch. 351.
(*i*) *Dutton* v. *Poole* (1677) 2 Lev. 210: *Marchington* v. *Vernon* (1787) 1 Bos. & P. 101n.
(*j*) [1937] Ch. 624.

hand and, on the other, cases concerned with insurance policies. Although the words of the section seem wide enough to cover any type of written contract provided it concerns "property" in the very wide statutory meaning of that word (*k*), there seems to have been only one reported case (*l*) on the section which was concerned with property other than land or insurance policies.

Cases Concerned With Land

It must be noted at the outset that cases concerning real or leasehold property where section 56 has been pleaded are often bedevilled by a confusion between those who claim as covenantees by virtue of the section and those who claim as assignees by virtue of the rules relating to the running of the benefit of covenants touching and concerning land. These latter rules have always formed a well-established exception to the strict doctrine of privity of contract, and their effect is to allow a person who is not a party to an instrument containing a covenant to sue on the covenant by showing that the covenant touches and concerns land and that he is an *assignee* of a person who was a party. We are not concerned with this body of doctrine except to notice that section 56 has no relevance to it at all. If the plaintiff's claim rests solely on the fact that although not a party he is an assignee of one who was, he must rely on the rules relating to the running of the benefit of a covenant, and section 56 helps him not at all. All that the section does is to extend the range of *original covenantees* to include not only persons who are party to the instrument, but other "persons who fall within the benefit and scope of the covenant according to the true construction of the document in question" (*r*).

It may be, of course, that the plaintiff is neither a person party to the instrument in question nor an assignee from such, but only an assignee from a person who is an original covenantee by virtue of section 56. Only in such a case will an assignee need and be able to rely on the section and, of course, he will still need the help of the rules relating to the running of the benefit of the covenant in order to succeed.

Re Ecclesiastical Commissioners for Englands Conveyance

This situation arose in the first reported case where section 56

(*k*) Denning L.J. seems to have no doubt that the principle embodied in the section would apply to commercial credits, pension agreements and household insurances: *Drive Yourself Hire Co. Ltd.* v. *Strutt*, *supra*, at p. 1483.

(*l*) *Re Miller's Agreement* [1947] Ch. 615.

(*r*) *Per* Greene M.R. [1938] Ch., at p. 365.

was pleaded—*Re Ecclesiastical Commissioners for England's Conveyance* (*s*). On the sale of a piece of land by V to P, P covenanted with V " and also as a separate covenant with V's assigns, owners for the time being of lands adjoining " the land sold, to observe certain restrictions on the user of the land. X was such an owner whose predecessor had taken his conveyance from V *before* P took his conveyance. The question was whether X could enforce the restrictions against P. Luxmoore J. held that he could because, first, as a matter of construction the covenant was referring to V's *previous* assigns, second, since X's predecessor was such, he was by virtue of section 56 a covenantee although not a party to P's conveyance, and third, the benefit of such covenant passed to his successor, X, since it touched and concerned the covenantee's land.

So far, no narrow interpretation has been given to the section —indeed, in that part of Luxmoore J.'s judgment in which he considered the section, the emphasis is rather the other way—on how the wording of section 56 extends the rule laid down by section 5 of the Real Property Act and how the limitation imposed on section 5 by *Forster* v. *Elvet Colliery* (*t*) can have little relevance to section 56. But, of course, the instant case was a strong one, and such as would be caught by any meaning given to the section, however restrictive. The covenant was in so many words expressed to be made with certain persons who were not parties, *i.e.*, assigns, owners for the time being of land adjoining, and to deny such the benefit of the section would be to reduce it to meaninglessness. But it is significant that Luxmoore J. did not require the covenant to designate by name the persons to take the benefit of it—he was prepared to admit and did admit extrinsic evidence of the surrounding circumstances to discover who those persons were.

White *v.* Bijou Mansions

In *White* v. *Bijou Mansions* (*u*), on the sale of Plot A to X, X covenanted not to use the land as other than a private dwelling-house and the vendors " for themselves, their heirs executors administrators and assigns with intent to bind themselves and all other persons in whom the residue of the S. H. Estate shall for the time being be vested . . . convenanted with X, his heirs and assigns that every building lease . . . of any part of the said S. H. Estate should contain covenants and conditions on the part of

(*s*) [1936] Ch. 430.
(*t*) [1905] 1 K.B. 629.
(*u*) [1937] Ch. 610, on appeal [1938] Ch. 351.

the Purchaser lessee or owner of the property" with the vendors to use the land as a private dwelling-house only. The vendors also bound themselves by a similar covenant in respect of the period during which the land should remain in their ownership, and covenanted that they would at X's request enforce the conditions against future purchasers, lessees or owners.

On the subsequent sale of Plot B to Y, Y covenanted for himself, his heirs, executors, administrators and assigns with the Vendors, their heirs and assigns, that the property should be used as a private dwelling-house only. The plaintiff derived title from X and the defendant from Y. The plaintiff sought to restrain the defendant from converting the house on Plot B into flats.

It will be noted that there is only one covenant with which the defendant could possibly be concerned—*i.e.*, the one by his predecessor Y with the vendors, their heirs and assigns (*v*). The plaintiff had therefore to show that *his* predecessor, X, was either the assignee of the benefit of that covenant or an original covenantee although not a party to Y's conveyance. He failed to show the former, since he could not prove that the S. H. Estate, of which Plots A and B were parts, was affected by a building scheme. When one compares the rights given to X by his conveyance with the obligations imposed on Y by *his* conveyance, it is apparent that the restrictions were not understood by X and Y and their common vendors as being "for the common advantage of the several purchasers" (*w*) so that any one could enforce them against any other. The covenant which the vendors were required to extract and did extract from Y was not with X personally, nor with the owners of other parts of the estate (*x*) but merely with the vendors, their heirs and assigns, in which expression the word "assigns" was construed to mean "assigns subsequent to Y's conveyance." Moreover, as was pointed out by Greene M.R. (*a*), it was obviously not the intention of anyone that X should himself enforce the restrictions against future purchasers such as Y, since the vendors covenanted with X that, at his request, *they* would enforce the covenants which they were required to take from persons such as Y.

These arguments dispose of any suggestion of a building scheme, and they are equally fatal to any claim that X was an original covenantee by virtue of section 56. The covenant by Y was with

(*v*) Simonds J. at [1937] Ch. 622 had no difficulty in holding that the defendant was not affected in any way by the vendors' covenants with X.

(*w*) *Nottingham Patent Brick and Tile Co.* v. *Butler* (1886) 15 Q.B.D. 261, *per* Wills J., at p. 268.

(*x*) As in *Re Ecclesiastical Commissioners for England's Conveyance*, *supra*.

(*a*) [1938] Ch., at p. 363.

the vendors their heirs and assigns, and with no one else, nor was it expressed to be for the benefit of anyone else. As assigns meant subsequent assigns, and as X was a previous assign of the vendors, it follows that it was not the intention of Y and the vendors that the covenant should be enforced by X or his successors, who quite clearly do not "fall within the scope and benefit of the covenant" (*b*). The claim under section 56 was clearly misconceived and even a generous interpretation of the statutory words would not help the plaintiff, who in truth was no more than a complete stranger who was not intended to benefit, but in fact would benefit by the covenant's enforcement.

Stromdale & Ball Ltd. *v.* Burden

The only other case concerning land where section 56 was the main ground of the decision is *Stromdale & Ball Ltd.* v. *Burden* (*c*). In that case the defendant landlord by a deed made with her tenants gave the latter a licence to assign their tenancy to the plaintiff company, which was not a party to the deed. Clause 4 of the deed provided:

> "If during the continuance of [the lease] the company shall be desirous of purchasing [the reversion] at the price of £1,250 and shall at any time during the term granted by [the lease] give to the landlord fourteen days' notice in writing of such desire the landlord hereby covenants that she will at the expiration of such notice and upon payment of the said sum of £1,250 together with all rent [up to completion] assign all her interest . . . to the company."

Danckwerts J. held that section 56 enabled the plaintiff to enforce the covenant, since the case was covered exactly by the dicta of Simonds J. (*d*) and Greene M.R. (*e*) in *White* v. *Bijou Mansions* quoted above (*f*). The intention of clause 4 was to enable the person therein named (the plaintiff company) and no one else, to obtain the interest of the defendant, and on this ground Danckwerts J. distinguished *Re Foster* (*g*) (*h*).

Before we pass on to cases where section 56 was not the main ground of the decision, it is as well to note that in none of these cases discussed above was the position of the plaintiff marginal, in

(*b*) *Ibid.*, p. 365.
(*c*) [1952] Ch. 223.
(*d*) [1937] Ch. 625.
(*e*) [1938] Ch. 365.
(*f*) *Supra*, pp. 46, 47.
(*g*) (1938) 159 L.T. 279.
(*h*) He also held that the covenant was an offer intended to be communicated to the offeree and accepted by it before revocation.

the sense that it was doubtful whether he fell within the scope of the section or not. In *Re Ecclesiastical Commissioners' Conveyance* and in *Stromdale* v. *Burden* he was clearly within the section, however narrowly interpreted, while in *White* v. *Bijou Mansions* he was equally clearly outside, however widely the section was interpreted. There was thus no need for any of these cases to place an artificial and restricted meaning on the words of section 56, and, if Simonds J.'s test (*i*) be liberally interpreted, as suggested by Denning L.J. in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* (*j*), or if Greene M.R.'s test (*k*) be accepted as the true one, then it is submitted that no artificial and restricted interpretation was in fact imposed by any of these cases. Nevertheless, as will be seen, in the insurance policy cases, where the applicability of the section *was* in doubt, the imagined restrictions imposed by the *Ecclesiastical Commissioners* case and *White* v. *Bijou Mansions* were used to exclude the plaintiff from claiming the benefit of the section.

Section 78 (1) of the Law of Property Act, 1955
Smith & Snipes Hall Farm, Ltd. *v.* River Douglas Catchment Board

In *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* (*l*) the Court of Appeal was presented with an excellent opportunity of applying section 56 in a case where the plaintiff was not named expressly either as the covenantee or as the person for whose benefit the covenant was taken, yet was nevertheless a person for whose benefit the covenant would naturally be expected to enure. However, probably as the result of defective pleading and misplaced argument, the opportunity was missed, and although the decision was a unanimous one, it was reached independently of section 56 by a much rockier route, bestrewn with pitfalls which were not apparently appreciated by the members of the court and which make the ratio one which cannot be supported in the light of earlier authority.

The facts of the case were that in 1938, by an agreement under seal, the defendant board agreed with the owners of certain lands liable to flooding that in consideration of the owners contributing to the cost the board would make good and maintain the banks of the Eller Brook for all time. In 1940, one of the contributing owners conveyed his land and assigned the benefit of the agreement

(*i*) [1937] Ch., at 625, *supra*, p. 46.
(*j*) [1953] 2 All E.R., at p. 1481.
(*k*) [1938] Ch., at 365, *supra*, p. 47.
(*l*) [1949] 2 K.B. 500.

to the first plaintiff, who leased the land from year to year to the second plaintiff. In 1946, owing to defective work on the part of the Board, the Eller Brook burst its banks and flooded the plaintiffs' land to a depth of six feet. Both plaintiffs sued for damages for (*inter alia*) breach of contract.

As far as the first plaintiff was concerned, once it had been held that the covenant in question touched and concerned his land, and was intended to run with it, the position was quite clear; he was entitled to enforce it at common law. He was a true assign of the original covenantee and satisfied the requirement of the common law that he must be in as of the same estate as the covenantee. But the position of the second plaintiff, who in fact had suffered most of the damage, is at first sight far less enviable. Being a mere lessee from year to year, he was not an assignee of the estate in the land to which the benefit of the covenant was attached (*i.e.*, the fee simple); and a long line of authority from Coke (*m*) to *Westhoughton U. D. C.* v. *Wigan Iron and Steel Co., Ltd.* (*n*) excluded him completely from the common law doctrine of covenants running with the land.

However, the Court of Appeal held unanimously that the rule that the plaintiff must be in as of the same estate as the covenantee has been abrogated by section 78 (1) of the Law of Property Act, 1925 (*o*). This subsection provides that " a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors or other persons were expressed."

Tucker L.J., after allowing the first plaintiff's claim, deals with that of the second plaintiff in these words (*p*): " and further, by virtue of section 78 of the Law of Property Act, 1925, it [the covenant] can be enforced at the suit of the covenantee and her successors in title and the persons deriving title under her or them, so that both the plaintiff Smith and the plaintiff company can sue in respect of the damage resulting to their respective interests therein by reason of the defendants' breach." Nowhere does the learned Lord Justice even address his mind to the question whether persons who merely derive title from the covenantee (such as lessees) are equated with true assignees by the section. Somervell L.J. (*q*)

(*m*) Co.Litt. 385b; " If a man hath a warranty to him, his heirs and assigns, and he make a lease for life or a gift in tail, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee simple whereunto the warranty was annexed."

(*n*) [1919] 1 Ch. 159, *per* Swinfen-Eady M.R., at p. 171.

(*o*) 15 Geo. 5, c. 20.

(*p*) [1949] 2 K.B., at p. 509.

(*q*) *Ibid.*, at p. 510.

does pose the question, but never answers it otherwise than by finding for both plaintiffs. Denning L.J. (*r*) roundly declares that the common law requirement that a plaintiff must be in as of the same estate as the covenantee has been abolished by the section.

But it is difficult to see that the section has any such positive effect and indeed the opinion widely held before 1949 was that it did not have any effect other than that of shortening conveyances by the implication of certain words which were usually inserted in full. This view is strengthened when it is recollected that the mere naming of successors in title in a covenant would not at common law have made the covenant one which ran with the land —it would merely have furnished some evidence of the parties' intention that the covenant should not be merely collateral and personal, the question of which intention had to be considered with due regard to the nature of the covenant *and* the surrounding circumstances (*s*). It would seem to follow that the section does not make any covenant run with the land which would not otherwise do so—it merely saves the draftsman the labour of writing in the words implied by the section. The question of its running still depends upon the parties' intention to be gathered *aliunde*. Nor did the mere naming as covenantees of "persons deriving title under the covenantee or his successors in title" confer any right on such persons, who must, as we have seen, be in as of the same estate as the covenantee before they could sue. Indeed no form of words could at common law confer rights on such persons who were not true assigns, and the wording of the section, which provides that the covenant shall have effect "as if such successors and other persons were expressed," seems to militate against any suggestion that the covenant should have any *other* effect unknown to the common law.

Of the three Lords Justices, Denning L.J. is the only one who declares unequivocally that section 78 (i) effects a change of substance rather than of form, and who gives reasons to support this view. After saying that by the section the covenant is deemed to be not only with the original owner but also with the purchasers of the land and their tenants as if they were expressed (*t*), he continues (*u*) "Now if they were expressed it would be clear that the covenant was made for their benefit, and they would clearly have sufficient interest to enforce it because they suffered the damage."

(*r*) *Ibid.*, at p. 516.
(*s*) *Rogers* v. *Hosegood* [1900] 2 Ch. 388, *per* Farwell J., at p. 396.
(*t*) Surely a somewhat loose paraphrase of the statutory words?
(*u*) [1949] 2 K.B., at 517.

With respect, one can accept the first assertion in this sentence without, however, accepting the proposition which is built on it, namely, that because the covenant was clearly for their benefit they have sufficient interest to enforce it (*v*). The benefit of a covenant was not annexed to land at common law, but to an estate in land, and only the possession of that estate was enough to give the plaintiff sufficient interest entitling him to enforce. This limitation was no doubt " productive of serious and disagreeable consequences " as Denning L.J. says, but has not, it is submitted, been removed by section 78 (1) (*w*). It is suggested that a better case can be made for saying that section 56 has removed the offending limitation, albeit with the assistance of section 78 (1).

Since he was able to give the second plaintiff relief entirely by virtue of section 78 (1), Denning L.J. did not discuss section 56 as exhaustively as he has elsewhere (*x*), but he suggested (*y*) that, subject to Greene M.R.'s restriction to " cases of persons within the scope and benefit of the covenant," it should be given full scope and applied to a case such as the one which he was considering. The difficulty in applying section 56 on its own to the *River Douglas Catchment Board* case is that there was nothing to show on the face of the covenant or in the rest of the deed that a person in the position of the second plaintiff (*i.e.*, a mere tenant of the covenantee's successor) was within the scope and benefit of the covenant. He was not designated, however loosely, as the object of the Board's covenant; he was not, in the words of Simonds J. (*a*), a person with whom, by that instrument, the covenant was purported to be made; nor, in the words of Denning

(*v*) It may be that Denning L.J.'s words are to be interpreted to mean that the mere suffering of damage is what gives the plaintiffs an interest to enforce, but the complete novelty of this doctrine compels one to assume that this interpretation is erroneous.

(*w*) In *Williams* v. *Unit Construction Co. Ltd.* (1951) reported at (1955) 19 *Conveyancer*, p. 262, the Court of Appeal (Lord Tucker, Singleton and Morris L.JJ.), expressed themselves bound on this point by the decision in *Smith* v. *River Douglas Catchment Board* [1949] 2 K.B. 500. A covenant to make up roads adjoining certain property made with the lessee of the property was therefore held to be enforceable by a weekly tenant of the lessee. Although Singleton L.J. admitted, at p. 269, that the point that a subtenant was not within the operation of s. 78 (i) was not pressed by the Board in the *River Douglas Catchment Board* case, he said that it was nevertheless before the Court of Appeal in that case, and was therefore not open to be raised again before the Court of Appeal. Accordingly no reasons other than the principle " *stare decisis* " were given by the court in *Williams* v. *Unit Construction Co. Ltd.* for applying s. 78 (1) to a subtenant of the original covenantee.

(*x*) *Drive Yourself Hire Co. Ltd.* v. *Strutt* [1953] 2 All E.R. 1475, at p. 1481.

(*y*) [1949] 2 K.B., at p. 517.

(*a*) [1937] Ch., at p. 625.

L.J. (*b*), was the covenant on the face of it made directly for his benefit in such circumstances that it was intended to be enforceable by him.

But it is difficult to see why the plaintiff should not be designated by the words which by section 78 are implied in every covenant relating to land. The combined effect of these sections on a covenant by X with Y relating to land of Y surely is that section 78 (1) having implied "and his successors in title and the persons deriving title under Y or them" after Y's name, section 56 provides that the benefit of the covenant may be taken by such persons although they are not parties to the deed. Granted that this does not admit casual strangers as plaintiffs, yet persons, such as lessees, who can describe themselves as persons deriving title under Y or his successors, can surely show that they are persons "with whom, by that instrument, the covenant was purported to be made." It may perhaps be objected that such persons must at least be in existence at the time when the covenant is entered into. This objection rests on *Kelsey* v. *Dodd* (*c*) where in an *obiter dictum* Jessel M.R. dealt with section 5 of the Real Property Act, 1845, in these words: "It gets rid of the objection which would arise from a man not being made a party, but it does not get rid of the objection to a non-existent party. I suppose you could no more covenant now than you could before, *simpliciter*, with the first son of A hereafter to be born, there being no other party to the indenture."

A suggested reply to this is that it could be raised with equal force in the case of section 78 (1), which the Court of Appeal are prepared to apply to a class of persons consisting of the covenantee and his successors in title and the persons deriving title under him or them, some of which might not be in existence at the date of the making of the covenant. If we exclude "successors in title," who are in a special position in that by ancient common law they step into a landowner's shoes and are completely identified with him for the purposes of covenants, that still leaves "the persons deriving title under him or them," a class which can only be described as uncertain and consisting or likely to consist of various non-existent persons.

The argument against admitting an uncertain body of persons as covenantees is often made to rest (as Jessel M.R. rested it) upon a supposed analogy between unascertained persons and unborn or non-existent persons. Unascertained persons may include unborn

(*b*) [1953] 2 All E.R., at p. 1482.
(*c*) (1881) 52 L.J.Ch. 34.

persons, so runs the argument; obviously one cannot covenant *simpliciter* with an unborn person, therefore one cannot covenant *simpliciter* with a class of unascertained persons. It is suggested that this *reductio ad absurdum* is not really a fair one. There is a difference between covenanting with a succession of persons which might coincidentally include the first son of A who is unborn at the date of the covenant, and covenanting now, *simpliciter*, with the first son of A as yet unborn. There seems no transcendent, self-evident principle of logic or legal science which demands that the policy of the law must treat these quite different transactions similarly. It would appear obvious that if the legislature wishes to make " the persons deriving title under X " capable covenantees, it can do so without going to the lengths of permitting covenants *simpliciter* with non-existent covenantees. The objection which has been raised in this article against giving section 78 (1) a scope wide enough to cover future tenants of a covenantee is simply that the section merely provides that certain words shall be written into a covenant without, however, providing that any effect unknown to the common law shall be given to the written-in words. The objection is *not* that the future tenants of the covenantee are unascertained, and it is suggested that section 56 should be similarly free of that objection.

If this combined effect of sections 56 and 78 (1) is admitted, it is suggested that the desired result in a case like that of the second plaintiff in *Smith* v. *River Douglas Catchment Board* will be reached quite independently of the common law doctrine of covenants and without either doing violence to the plain words of section 78 (1) or ignoring ancient precedent.

Chelsea & Walham Green Building Society *v.* Armstrong

In *Chelsea and Walham Green Building Society* v. *Armstrong* (*e*) by an instrument of transfer, X transferred certain registered land to the defendant, and in the instrument the defendant covenanted with the plaintiff building society, which was not a party, that he would repay money still owing under a mortgage of the registered land created by X in favour of the plaintiff. The plaintiff sued the defendant upon this covenant and one of the grounds upon which its claim was put was that section 56 allowed it to claim although not a party to the deed. Vaisey J.'s grounds for finding for the plaintiff was that the transfer was a deed not *inter partes*, and therefore at common law any person, whether a party or not, could

(*e*) [1951] Ch. 853.

sue on a covenant made therein with him (*f*). Vaisey J. (*g*) conceded that the point may have been covered by section 56 but, finding as he did, preferred to express no opinion.

No great assistance is rendered by this case since the rule applied therein always existed independently of and formed an exception to the rule of privity of contract. Denning L.J.'s attempt (*h*) to rely on Vaisey J.'s judgment to show that the rule in *Tweddle* v. *Atkinson* is no more is surely misguided. He says that in finding for the plaintiff building society Vaisey J. " went back to the old case of *Cooker* v. *Child*, but he could not have done so unless the rule in *Tweddle* v. *Atkinson* had been done away with so as to permit him to go back to the old common law. If it is permissible to go back to *Cooker* v. *Child* in the second volume of Levinz's Reports, why not also go back to *Dutton* v. *Poole* in the same volume? " This, with respect, seems somewhat naive—the whole point of the rule relating to deeds not *inter partes* and of Vaisey J.'s judgment, is that they are not " contracts " at all but matters of public record. The learned judge rested his decision entirely on a statement in Norton on *Deeds* (*i*), and nowhere in his judgment, nor in the argument before him, nor in the passage in Norton in which the statement is found is *Tweddle* v. *Atkinson* or the doctrine of privity of contract so much as mentioned.

Before we leave this case, it can be surmised that had the deed in question been a deed *inter partes*, there would have been the clearest case for applying section 56. The defendant's covenant was expressed to be with the plaintiff building society, and followed immediately on a covenant in similar terms by the defendant with his transferor, leaving one in no doubt that the intention of the parties was that the covenant with the building society was to be enforced by it directly. The defendant's argument (*j*) that section 56 was not applicable because the covenant was not " over or respecting land or other property " is clearly untenable having regard to the statutory definition of property as including " any thing in action and any interest in real or personal property (*k*)."

(*f*) *Cooker* v, *Child* (1673) 2 Lev. 74: Norton on *Deeds*, 2nd ed., p. 28.

(*g*) [1951] Ch., at p. 859.

(*h*) [1953] 2 All E.R. 1475, at p. 1483.

(*i*) 2nd ed., p. 29: " A deed poll could always be sued upon by any person with whom the covenant was made and an indenture not *inter partes* is for this purpose a deed poll."

(*j*) [1951] Ch., at p. 858.

(*k*) L.P.A., 1925, s. 205 (i) (xx). In *Re Foster* (1938) 159 L.T. 279 and in *Re Sinclair's Life Policy* [1938] Ch. 799, it was held that the right to sue for insurance policy moneys was within the section.

Drive Yourself Hire (London) Ltd. *v.* Strutt

In *Drive Yourself Hire (London), Ltd.* v. *Strutt* (*l*) A leased premises for twenty years to the first defendant with a covenant against assigning or underletting without consent. The first defendant with the consent of A sublet to X. This consent was given on terms that a covenant should be inserted in the sublease requiring X to get the consent of both A and the first defendant before assigning or subletting the sublease. Such a covenant was inserted in the sublease to X in the following terms: "The tenant agrees with the landlady [the first defendant] not to assign underlet or part with the possession of any part of the demised premises or any part thereof without the written consent of the landlady and the superior landlord."

There was also a power of re-entry and determination for breach of covenant, which was reserved to the first defendant only. Later X, with the consent of both A and the first defendant, assigned the sublease to Y, subject to the performance by Y of the covenants in the original sublease. Later still, A assigned the reversion to the plaintiff, and then Y purported to assign the sublease to the second defendant with the consent of the first defendant but without the consent of the plaintiff. The question for the decision of the court was whether the second defendant was a subtenant to whom the premises had been "lawfully sublet" so as to claim the protection of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*n*).

It was held by the Court of Appeal that to claim the benefit of the section, the second defendant must show that the assignment to him was lawful, and it was not, since it was in the breach of a clause in the sublease which was inserted at the request and for the protection and benefit of the superior landlord, even though he was not a party and could not have forfeited the sublease for breach of the clause.

The main ground of the judgments of all three members of the court was that there was an implied term in the licence agreement between A and the first defendant that the first defendant should not waive the term in the sublease requiring the sublessee to obtain A's consent to an assignment. On the evidence, the first defendant's conduct was equivocal and it was not clear whether she had purported to waive the term. If she had not, then plainly the assignment to the second defendant in breach of it was unlawful, but even if she had purported to waive the term, this merely meant

(*l*) [1953] 2 All E.R. 1475.
(*n*) 10 & 11 Geo. 5, c. 17.

that she had debarred herself from complaining, the assignment being nonetheless unlawful as far as A, or his successor, the plaintiff, was concerned. The fact that the head lessor was unable to forfeit the sublease for breach of the term was expressly held to be immaterial. Denning L.J., while concurring in this reason for finding for the head landlord, also based his judgment on section 56 and quite clearly thought that the section would have enabled the plaintiff to sue on the covenant had he suffered damage. Somervell and Romer L.JJ. did not go as far as that, but it is submitted that the implication of the judgments is that the plaintiff could have sued on the covenant in the sublease. Y's action in assigning to the second defendant was held to be unlawful, not as far as the first defendant was concerned because she, having purported to waive the requirement of the head lessor's consent, could not complain; not as far as the rest of the world was concerned (the assignment in breach of covenant was not criminal); but only as far as the head lessor was concerned. When one man does something which is unlawful *vis-à-vis* one other man and no one else, this surely means that if that other man has suffered damage he can complain, *i.e.*, sue for damages.

Summary

The argument so far can be compressed into three propositions:

(i) If a covenant is expressed to be with a definite person, even though he is not designated by name, he can sue on it although not a party to the deed; and if the covenant is one which runs with his land, so can his successors in title to that piece of land, the expression "successors in title" being confined to true assigns and not, *e.g.*, his tenants.

(ii) If a covenant is not expressly made "with" any person other than parties to the deed, but is by its terms or as a necessary implication from the surrounding circumstances, meant to enure for the benefit of some person not a party, that person can sue on it.

(iii) The operation of section 78 (1) of the Law of Property Act, 1925, is, in the case of a covenant relating to land of a covenantee who *is* a party to the deed, to bring his successors in title and persons deriving title under him or them within the scope of proposition (ii) above—the covenant by its terms (as supplied by section 78 (1)) is meant to enure for the benefit of certain persons not party to the deed wherein the covenant is contained.

(To be concluded)

NOTES OF RECENT CASES

1. *REAL PROPERTY*

By F. R. Crane, ll.b., Solicitor

Re Ellenborough Park [1955] 3 W.L.R. 892; [1955] 3 All E.R. 667 (C.A.)

Easement—use of pleasure ground—validity.—The Court of Appeal (Evershed M.R., Birkett and Romer L.JJ.) has affirmed the decision of Danckwerts J. (noted *ante,* Vol. 19, p. 220) that the grant of "full enjoyment of the pleasure ground set out and made . . . called Ellenborough Park" created a valid legal easement. A further and fuller note seems now to be desirable, however, because the reserved judgment of the court, delivered by the Master of the Rolls, is the most elaborate and authoritative judicial survey of the essential nature of easements that has appeared for many years. As the Master of the Rolls remarked ([1955] 3 W.L.R. at p. 898; [1955] 3 All E.R. at p. 672) these well-known rights have not been clearly tested before. Three main points were considered:—the construction of the deed and (adopting Cheshire, *Modern Real Property,* 7th ed., pp. 416 *et seq.*) the requirements that an easement must accommodate the dominant tenement and be capable of being the subject-matter of a grant.

1. *Construction.* The court held the words quoted above (i) were intended to create a legal easement if possible, (ii) contemplated the "enjoyment of the vendors' ornamental garden in its physical state as such . . . a common and clearly understood conception," subject to the vendors' rules and regulations as to footpaths, lawns, etc., as in the case of public parks ([1955] 3 W.L.R. at p. 905; [1955] 3 All E.R. at p. 677). These findings appear to constitute the facts by which the *ratio decidendi* could be limited, a point likely to be relevant when the decision is cited in future cases.

2. *Benefit to the Dominant Tenement.* The court first rejected the argument, based on some expressions in *Bailey* v. *Stephens* (1862) 12 C.B.(n.s.) 91 that an easement must benefit the dominant tenement to the exclusion of anyone else—here the public who had access to Ellenborough Park. In other words, easements and licences over the same subject-matter are not necessarily mutually exclusive.

On the main point, the court held an easement must be connected with the "normal enjoyment" of the dominant tenement, a requirement here satisfied because the rights granted were equivalent to the use of a garden, which "undoubtedly enhances and is connected with the normal enjoyment of the house to which it belongs. It [Ellenborough Park] is the collective garden of the neighbouring houses" ([1955] 3 W.L.R. at pp. 910, 911; [1955] All E.R. at pp. 679, 680; *Hill* v. *Tupper* (1863) 2 H. & C. 121 was distinguished). Though the words

quoted and the whole passage in the judgment provide, it is suggested, a new test by which benefit to the dominant tenement may be determined, they will hardly let in a flood of new easements; for example, commercial advantages will still have to relate to business conducted on the dominant tenement, as laid down in, *e.g., Moody* v. *Steggles* (1879) 12 Ch.D. 261 and *Att.-Gen. for Southern Nigeria* v. *John Holt and Co.* [1915] A.C. 599.

3. *Subject-Matter of a Grant.* The court held the rights here were (i) not too vague, but "well defined and commonly understood," (ii) not equivalent to joint ownership or possession, distinguishing *Copeland* v. *Greenhalf* [1952] Ch. 488 and (iii) not merely matters of recreation and amusement, distinguishing *Mounsey* v. *Ismay,* 3 H. & C. 486. Furthermore, if the rights amount to a *jus spatiandi* then such rights were not unknown to English Law, notwithstanding the dicta of Farwell J. in *International Tea Stores* v. *Hobbs* [1903] 2 Ch. 165 and *Att.-Gen.* v. *Antrobus* [1905] 2 Ch. 188; the decision in *Duncan* v. *Louch* (1845) 6 Q.B. 904 was a direct authority for the validity of the rights now claimed ([1955] 3 W.L.R. pp. 914–290, [1955] 3 All E.R. pp. 681–688). The effect of this part of the decision is, it is submitted, that an easement will be sufficiently certain if it can be interpreted by the courts, thereby making the range of easements, in this respect, as wide as that of restrictive covenants. (*Cf. National Trust* v. *Midlands Electricity Board* [1952] Ch. 580.) Previously easements have been subject to some undefined but clearly stricter limits.

Generally, the decision both defines and extends the boundaries of easements. As noted *ante,* Vol. 19 at p. 221 the grant of such easements can now be an effective method of preserving open spaces. Equity has often been termed the preserver of London's squares through *Tulk* v. *Moxhay* (1848) 2 Ph. 774, and it is somewhat ironic to find that the common law, unheralded and unsung, had come to the rescue three years earlier in *Duncan* v. *Louch, supra.* In *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, Denning L.J. suggested at p. 481 that a covenant in *Tulk* v. *Moxhay* to allow residents to use the square would have been enforced as a contractual licence, but neither the learned Lord Justice nor any subsequent commentator contemplated easements in such circumstances. (The report of the Royal Commission on London Squares (Cmd. 3196) shows that many such squares were preserved only by the terms of conveyances before the London Squares Preservation Act, 1931.)

In discussing the question of benefit in the present case the court referred by way of analogy to, and regarded as valid, a right to share an ordinary garden created as appurtenant to part of a house sold. Here, again, sharing arrangements in Rent Restriction cases have been termed licences—see *Dakyns* v. *Pace* [1948] K.B. 22 at p. 25 and Cheshire on *Modern Real Property,* 7th ed., at pp. 825–826. Now such rights may be easements. Easements for short terms of years can of course be expressly or impliedly created and therefore all "extras" of this sort given to tenants should be very carefully watched (*cf. Wright* v. *Macadam* [1949] 2 K.B. 744 especially at p. 755 *per* Tucker L.J. and *Goldberg* v. *Edwards* [1950] Ch. 247).

One final query may be noted. The court remarked, in passing, that the easement would be conditional on the owner of any dominant tenement paying his share of upkeep as provided by the grant ([1955] 3 W.L.R. at pp. 904, 905; [1955] 3 All E.R. at pp. 676, 677). This could mean either that such an owner would be estopped from suing if in default, or that the easement, though legal, was for an estate equivalent to a fee simple subject to a forfeiting right of entry (Law of Property Act, 1925, s. 7 (i)). In the latter event, however, the right of re-entry, necessarily equitable (L.P.A. s. 1 (2) (e)), would seem to be void because not limited to the perpetuity period (L.P.A. s. 4 (3)).

Re Truman, Hanbury, Buxton & Co. Ltd.'s Application
[1955] 3 W.L.R. 704; [1955] 3 All E.R. 559 (C.A.)

Restrictive covenant—discharge as obsolete—Law of Property Act, 1925, s. 84.—This was an appeal from the dismissal of an application, under the Law of Property Act, 1925, s. 84 (1), for the discharge of a restrictive covenant against using premises for the purpose of an inn, public-house, etc. The Lands Tribunal found that although in an area developed as a residential estate a number of shops now existed—particularly on the old London–Southend road where the applicant brewers wished to place their public-house—the discharge of the covenant would injure the objectors, whose gardens adjoined the proposed site. The Tribunal relied on the principle enunciated in *Chatsworth Estates Co.* v. *Fewell* [1931] 1 Ch. 224 (a case on equity's general jurisdiction to refuse to enforce covenants) that the defendant must show there was " so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all "; consequently they refused to find the present covenant obsolete. On appeal counsel now contended that, in an application under section 84 (1) (a) of the Law of Property Act, 1925, " obsolete " in the subsection meant not valueless but only " fallen into disuse " and " out of date," especially as section 84 (1) (c) gives separate jurisdiction if discharge or modification will not injure the persons entitled to the benefit of the covenant.

The Court of Appeal, in a judgment delivered by Romer L.J. (with whom Evershed M.R. and Birkett L.J. concurred) held that covenants would become " obsolete " when their original purpose (here preserving the character of the estate as a residential area) could no longer be served—when, for example, a residential area had become substantially a commercial area; the finding in the instant case that discharge of the covenant would seriously injure the applicants made it almost impossible to say the covenant was obsolete.

With respect, the court here seems to have equated two tests which are not necessarily equivalent. The value of houses remaining residential in the area " substantially commercial " might nevertheless be seriously impaired by the opening of a public-house next door to them; its effects would be quite different from those of the ordinary shop closing early in the evening. Consequently further elucidation of this point may be necessary. The reference in section 84 (1) (a) to changes

in " the character of the property or the neighbourhood " seems to indicate that the more general test is the correct one, but it will be noted that this is not as stringent in its language as that laid down in *Chatsworth Estate Co.* v. *Fewell, supra.*

Fibrance v. *Fibrance* [1955] 3 W.L.R. 890; [1955] 3 All E.R. 787 (P.D.A.)

Husband and wife—property—Married Women's Property Act, 1882, s. 17—*jurisdiction in relation to divorce.*—In September, 1955, after obtaining a decree nisi of divorce, a wife issued a summons under the Married Women's Property Act, 1882, s. 17. Before this was heard the decree was made absolute on the husband's application. Barnard J. now held in a reserved judgment that if the court had jurisdiction when the summons was issued (the parties then being husband and wife), it had also jurisdiction to carry the matter to a conclusion, following *Hichens* v. *Hichens* [1945] P. 23.

Poole Corporation v. *Blake* [1955] 3 W.L.R. 757; [1955] 3 All E.R. 409 (Divl. Ct.)

Sewers—vesting in local authority—charge on frontagers when road taken over—Private Street Works Act, 1892, ss. 6, 9.—Prior to the Public Health Act, 1936, which came into force on October 1, 1937, most sewers—that is, " lines of pipes " serving more than one building—vested in the local authority as soon as they were completed under the Public Health Act, 1875, s. 13. The local authority then had a reasonable time in which to decide whether to charge the frontagers with works to such sewers under section 150 of the Act (*Bonella* v. *Twickenham Board of Health* (1887) 20 Q.B.D. 63). Roads have not since the Highways Act, 1835, vested in local authorities unless and until they decide to make them up and take them over, and the same law now applies to sewers by virtue of the Public Health Act, 1936, s. 20. Where, as often happens, local authorities have done nothing about roads or sewers constructed before 1937, the result of the above provisions is that the frontagers can be charged with making up the road under the Private Street Works Act, 1892, but not with work on the sewers.

The present case resulted from a new and ingenious but unsuccessful attempt to make frontagers responsible for a surface drainage system vested in the local authority since 1923 or 1924. The Private Street Works Act, 1892, s. 6, permits the local authority to charge frontagers where " any street is not paved, sewered etc. . . . " to the satisfaction of the authority, while section 9 permits the authority to include " any works . . . to bring the street . . . as regards sewerage . . . " into conformity with other streets. The Divisional Court (Lord Goddard C.J., Ormerod and Barry JJ.) now held that section 9

is merely complementary to section 6 and permits the work of making-up to be determined by reference to the standard in the district as opposed to that of the particular road (*cf. Caley* v. *Kingston-on-Hull Local Board of Health* (1864) 5 B. & S. 815). Section 9 was not a separate authorisation permitting charges of a nature which could not be made under section 6, and *Bonella's* case, *supra,* remained good law.

In short, at the present remove of time from October 1, 1937, local authorities may be deemed responsible for all sewers and drainage systems vested in them. (For the definition of sewers, the law of vesting, and generally, see J. F. Garner, *The Law of Sewers and Drains.*)

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Hawkesley v. *May* [1955] 3 W.L.R. 569;
sub nom. *Hawksley* v. *May* [1955] 3 All E.R. 353 (Q.B.D.)

Trustee—duties to beneficiaries—information as to interests—joint tenancy—severance.—This case illustrates the difficulty that sometimes occurs of finding authority for apparently straightforward propositions of law. The plaintiff and his sister, born in 1918 and 1921 respectively, were entitled on attaining twenty-one to a trust fund absolutely as joint tenants. The trustees, on advice, did not notify him or pay interest until the sister attained twenty-one, and then their letter to the plaintiff was intercepted by his father. Eventually the plaintiff's share was paid to trustees of a voluntary settlement made by him. The sister in the meantime asked in March 1942 for dividends to be paid to her bank, and her capital was transferred to her in September 1942. The plaintiff, alleging ignorance of his rights until after his father's death in 1948, now brought an action for fraud, conspiracy, and breach of trust. The reports deal only with the trust questions.

Havers J. held:—(1) The trustees were under a duty to inform the plaintiff of his interest in the trust fund as soon as he attained twenty-one, following *Burrows* v. *Wall* (1855) 5 De G. M. & G. 233 (a case on acquiescence) and distinguishing the position of an executor who need not tell a legatee of the terms of a legacy, even if the executor stands to gain as a result of his omission (*Re Lewis* [1904] 2 Ch. 656). (2) The trustees were not required to explain to the plaintiff his power to sever the joint tenancy, though they must produce documents, including counsel's opinion, on demand. (3) That the trustees were bound to pay income to the plaintiff on his attaining twenty-one without demand by him, citing *Low* v. *Bouverie* [1891] 3 Ch. 82 at p. 99 and *Wroe* v. *Seed* (1863) 4 Giff. 425. The joint tenancy in the income was severed as it became payable. (4) The trustees could claim the protection of the Limitation Act, 1939, s. 19 (2), and if need be of the Trustee Act, 1925, s. 61.

The learned judge also held that the joint tenancy was severed by the sister's request for payment of dividends, or alternatively by the payment of capital to her, regarding these as " acts operating on her own share " within *Williams* v. *Hensman* (1861) 1 J. & H. 546. With respect, the second alternative seems the more sure. Payment out of a share must be severance—mere demand is apparently not (*Williams* v. *Hensman, supra,* and *Re Wilks* [1891] 3 Ch. 59), while the courts have distinguished carefully between actual dealings or transfer and statements of intention. (*Re Wilkes, supra,* and cases there cited.) Agreements or dealings by both joint tenants are not in point here, nor could the sister's letter be notice to the other joint tenant within the Law of Property Act, 1925, s. 36. Her direction as to payment of dividends could be regarded as merely directing the trustees how to do what they were already bound to do in law and as compatible with the continuance of the *jus accrescendi.*

Re Pelly's Will Trusts [1955] 3 W.L.R. 696; [1955] 3 All E.R. 483 (Ch.D.)

Settled Land—improvements and repairs—payment out of capital —tenant for life accountable for income tax—trusteeship of tenant for life—Settled Land Act, 1925, ss. 73, 107.—This was another case arising out of the payment for running repairs to settled land from capital by reason of the amendments made by the Agricultural Holdings Act, 1948, to the Settled Land Act, 1925. (See *Re Duke of Northumberland* [1951] Ch. 202; *Re Sutherland Settlement Trusts* [1953] Ch. 792; *Re Wynn, deceased* [1955] 1 W.L.R. 940; [1955] 2 All E.R. 865, *ante* Vol. 19, p. 390.) The question was whether, if such repairs were paid for out of capital, the tenant for life must account to the trustee for any income tax repayment obtained by a maintenance claim (Income Tax Act, 1952, s. 101), on the assumption that the payment by the trustee did not rank as any part of the tenant for life's income or trade receipts as a farmer. Wynn-Parry J., following the view expressed by Harman J. in *Re Sutherland, supra,* held that the tenant for life, being under section 107 of the Settled Land Act a trustee of his powers, must account for any repayment. Furthermore, his trusteeship imposed a definite obligation to make a maintenance claim whenever he was entitled to do so. This decision, which gives a fresh emphasis to the trusteeship of the tenant for life, is in line with the courts' attitude to annuities given free of income tax, where that expression denotes a clear sum of spending money—see *Re Lyons* [1951] Ch. 129, in which the earlier authorities are discussed. It may be added that since the trustees could not claim any repayment of tax on the capital sums paid, such sums are not, apparently, excluded from the expenditure which ranks for a repayment claim by the tenant for life (Income Tax Act, 1952, ss. 101 (3), 332 (2); Simon on *Income Tax,* 2nd ed., Vol. 1, at p. 535, Vol. 2, at p. 362).

Re Simmons, Simmons v. *Public Trustee and Others*
[1956] 2 W.L.R. 16; [1955] 3 All E.R. 818 (Ch.D.)

Settlement—variation of trusts—jurisdiction—trust for sale—Settled Land Act, 1925, s. 64—*Law of Property Act,* 1925, s. 28.—Land held on trust for sale and investments stood limited to the plaintiff for life on protective trusts and thereafter to her children; on failure of these trusts she had a general power of appointment, and in default of appointment the property was to accrue to funds held for her brothers on similar trusts. The plaintiff was sixty-three years of age and unmarried. The court was now asked for consent to a scheme whereby half the trust fund was to go to the plaintiff absolutely and the other half to be released from her general power of appointment.

Danckwerts J. held:— (1) The Law of Property Act, 1925, s. 28 (1), conferring on trustees for sale "all the powers of a tenant for life" gave them the powers of section 64 of the Settled Land Act, 1925, and it was immaterial that the powers of this section required an order of the court to render them available (following *Re Wellstead* [1949] Ch. 296). (2) The proposed transaction fell within the jurisdiction of section 64 as a "transaction affecting or concerning the settled land" in accordance with the decision of the Court of Appeal in *Re Downshire's Settled Estates* [1953] Ch. 218. (3) The transaction should be authorised as being for the benefit of persons interested under the settlement.

This is an interesting and important decision which may, with respect, be described as robust. First, it by-passes *Chapman* v. *Chapman* [1954] A.C. 429 without mention. Of course section 64 was irrelevant in that case, but it was a secondary ground of decision in *Re Downshire* ([1953] Ch. at pp. 252–254, 259 and 260) which was described by Lord Morton of Henryton in *Chapman* as "going too far" ([1954] A.C. at p. 462). This disapproval was expressed without qualification, though a little earlier Lord Morton had made passing mention of section 64. The remainder of the majority of the House expressed agreement with Lord Morton's judgment. Secondly, Danckwerts J. gave section 64 a wide interpretation. The general test propounded by the Court of Appeal in *Re Downshire, supra,* was that the effect on the settled land should be "real and substantial by ordinary commonsense standards as distinct from that which is oblique or remote and merely incidental" ([1953] Ch. at p. 253). This is now held to be satisfied where the land is freed from the settlement altogether; further, arrangements to save tax are regarded as for the benefit of the parties (following *Re Downshire* [1953] Ch. at p. 233). This logical application of *Re Downshire* means, however, that section 64 when applicable gives the court an almost general jurisdiction to remodel trusts.

When, then, can section 64 of the Settled Land Act be invoked? It clearly applies when the trust fund consists of settled land, or of settled land and capital money under the Settled Land Act, when the transaction may affect the money as well as the land—see *Re Scarisbrook* [1944] Ch. 229 and especially *Re Downshire,* where the real gist of the scheme was redistribution of capital money, a point

on which an unsuccessful argument was based ([1953] Ch. at pp. 224–225, 256–257). In the instant case Danckwerts J. seems to have limited his decision to the land held on trust for sale ([1956] 2 W.L.R. at p. 19; [1955] 3 All E.R. at p. 820), while s. 28 (1) of the Law of Property Act refers to land and the proceeds of sale thereof.

Consequently section 64 seems not to apply to capital money settled with land under a trust for sale. If this is correct, administrative difficulties are likely, and it will be desirable to record carefully these investments which represent land formerly held. If all the land is sold, then section 64 cannot apply, whatever the form of the settlement, but the Trustee Act, 1925, s. 57 (limited to administrative matters) will apply unless the settlement originally operated under the Settled Land Act (see *Re Downshire* [1953] Ch. at p. 254). The moral seems to be that a well-regulated trust fund should include land at all times, and that provided this is so there may be distinct advantages in having a settlement under the Settled Land Act.

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3. *CHARITIES*

By A. KIRALFY, Barrister-at-Law

Re Cottam [1955] 1 W.L.R. 1299; [1955] 3 All E.R. 704

Relief of aged—element of poverty—incorporation by reference.—A trust fund was to be transferred under the directions in the will of a testator to the Huddersfield Corporation in order to provide flats to be let at economic rents to persons over 65. The terms of letting of certain Old People's Homes were referred to by the testator as a possible model for terms of letting. It was clear that the testator did not mean "economical" or subsidised rents, but a fair return, but without providing for any profit. Danckwerts J. held that the gift was charitable. The reference to Old People's Homes made it clear that a means test was to be applied, which would mean the more indigent would pay less, so there was an element of poverty implied. The learned judge considered that age was in any case a proper object of charity but this was not necessary to the actual decision. It is true that the preamble to the statute of Eliz. I does refer to aged, impotent and poor people and that this has been described as disjunctive, but an examination of the decisions will show that some other element besides mere age was involved. In *Re Glyn* [1950] W.N. 373 the old people were indigent women no longer able to earn a decent living and in *Re Bradbury* [1950] W.N. 558 the old people were in nursing homes and suffering as a result of age and weakness. The ruling in *Re Robinson* [1951] Ch. 198 by Vaisey J. that age without poverty is also an object of charity is based on these cases and seems to go far beyond them. Age indeed may bring on suffering, decrepitude, inability to move

about, to shop, earn extra income, etc., but age need not mean any of these things. All persons over 65 are not in special need of help. We have had distinguished Prime Ministers serving well above that limit. No doubt pension legislation has had some influence on the choice of 65 in many of these wills as the age of qualifying for special assistance.

(Theobald 336)

Re Young [1955] 1 W.L.R. 1269; [1955] 3 All E.R. 689

Relief of poverty—limitation to club members—no public element needed.—It is well established as an anomaly that a good charitable gift may be made to poor persons even if they are a small group such as blood relations or employees (*Re Compton* [1945] Ch. 123; *Gibson* v. *South American Stores* [1950] Ch. 177). In the instant case Danckwerts J. consistently applied this rule to the members of a club. A good charitable gift might be made to relieve financial need of members from time to time of a named club.

(Theobald 338)

Re Dick [1955] 11 C.L. 392

Public, political or economic goals not charitable.—Most forms of charitable gift must have a public element, but not every benefit conferred on the public is a charity. In *Re Nottage* [1895] 2 Ch. 649 a gift to provide a trophy for the winners of yacht races was held not to be charitable, though the improvement of boat design helped British reputation and maritime influence in the world. In the instant case part of residuary estate was left to be given to civil aviation undertakings to be chosen by a certain body. Danckwerts J. held this was a gift to commercial bodies and not charitable. This case may be more fully reported later. A gift to produce faster planes would presumably not be charitable though it improved this country's prestige. *Quaere* if for greater safety.

(Theobald 348)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Doring [1955] 1 W.L.R. 1217; [1955] 3 All E.R. 389

Family provision under Inheritance Act, 1938, s. 1; *what is reasonable?*—The instant case is rather more interesting than might

appear at first sight. The testator left net estates valued at £30,000. The total income of this estate was about £1,200 annually. He was survived by his widow and a brother and sister. He had put a provision in a partnership deed under which his partner would pay his widow £500 annually during the joint lives of the widow and surviving partner. So far the court considered the provision of a life interest in half the residuary estate adequate. Wynn-Parry J. referred to *Re Inns* [1947] Ch. 576, 586 and *Re Borthwick* [1949] Ch. 395, 400 as authorities for this. Indeed in those cases the provision ordered or approved by the court was: £1,000 on £130,000 in *Borthwick* and £3,000 on £600,000 in *Inns*. But the partnership deed only gave the widow her £500 so long as the net profit of the firm did not fall below £3,000 a year. This meant that the widow could get £1,100 a year in good times (£600 from residue, £500 from the annuity) but might get much less in bad times. Wynn-Parry J. ordered that a contingent annuity be authorised by court order, to make up any deficiencies in the original annuity due to bad trading and also to operate if the partner predeceased the widow, when the original annuity would stop altogether. The learned judge does not seem to have considered £600 a year as adequate provision in itself on a capital of £30,000.

It will be noted that the court considered provision made by the testator *dehors* the will. Although the Act of 1938 at first refers to "reasonable provision under the will or the law of intestacy" it goes on (s. 1 (6)) to refer to the dependant as not entitled to an order if her income "from any source" is adequate for her needs. It might be more elegant if the Act itself had said that a claim could be made if provision made by the will or otherwise by the testator or any other person was inadequate for the dependant's needs. The death of the testator is a condition of an application for maintenance under this statute but the income of the applicant may well have been considerable before his death, and this must also be taken into account. Hence the phraseology of the Act is misleading.

Wynn-Parry J. also refused to defer making an order. In some cases the court is not yet in a position to estimate the applicants' needs, *e.g.*, in *Re Franks* [1948] Ch. 62 it was held that the children's needs might change and further applications were provided for. In the instant case, however, it was considered that the court was as well able to judge the problem as at some later date. Whether the firm did or did not make £3,000 profit could not be foretold, but it could be foreseen and provided for. The fortunes of the business would not affect the applicant's needs, which would remain the same. The contingent nature of the annuity contained in the court order would settle the matter without further applications to the court.

(Theobald 97 *et seq.*)

In The Estate of Alberti [1955] 1 W.L.R. 1240; [1955] 3 All E.R. 730n.

Revocation of will of English land must comply with English law.—In this case a very important point of law was decided but the

court considered it too clear to require much discourse. English real estate is governed by English law, irrespective of the domicile of the owner or the place where he makes his will. It was held that a valid will of such property cannot be revoked by a later will ineffective according to English law. The law of succession is concerned with the whole complex of instruments left by a testator plus other circumstances, *e.g.*, marriage, and not just with a written document. The revocation of a will is a testamentary act in itself.

(Theobald 6)

Re Merrett's Settlement Trusts [1955] 11 C.L. 410

Settlor forfeits reversionary interest by slaying life tenant.—This case is a decision on the law of trusts and settlements and is not yet fully reported, but it does bear on the law of succession. It is well settled that no person can claim property on death, whether under a will or by the operation of the law of intestacy, if he brought about that death feloniously, *e.g.*, by murder. The court has not decided in any reported case what happens to the property in such cases, *e.g.*, whether it goes to the next person in line as if the murderer had not existed, or whether it passes to the Crown. On principle it seems it ought to go to the next person entitled to the property of the deceased, ignoring the murderer and all persons claiming through the murderer, however innocent. Wynn-Parry J. appears to have held that the claims of the Crown are superior. He has also extended the doctrine to a vested interest in reversion on the victim's life interest, though the effect of the alleged murder was only to accelerate the interest of the settlor vesting in possession. If both victim and slayer are dead it would seem reasonable that the slayer's own property should pass under his will. Theobald certainly assumes that the rule applies to avoid claims to other persons' estates and not to your own. Of course the death of the wife prevented the birth of issue who would have taken at the expense of the settlor, but failure to have children is not a crime in itself and it would be extending the rule inordinately to make that fact a sufficient reason to forfeit a man's own property. One is reminded of the old forfeitures in the Middle Ages when a murderer lost his own property for felony.

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5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Central Land Board v. *Saxone Shoe Co.* [1955] 3 W.L.R. 614; [1955] 3 All E.R. 415

Existing use—use classes—"shop."—In this case it was held (on a case stated to the Court of Appeal by the Lands Tribunal, in relation

to a determination of development value) that a public-house does not become a " shop " within the Use Classes for Third Schedule Purposes Order (1948 S.I. No. 955) upon losing its licence. The same would seem to be true under the current Use Classes Order (1950 S.I. No. 1131) which includes a rather different definition of the word shop. Just reading the court's judgments, one would suppose the point too clear for argument; but then it would seem that the Central Land Board had acted upon the opposite view, and the case was possibly not as simple as the judgments suggest.

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6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, m.a., of the Inner Temple Barrister-at-Law

Hills (Patents) Ltd. v. *University College Hospital Board of Governors* [1955] 3 W.L.R. 523; [1955] 3 All E.R. 365

Landlord and Tenant Act, 1954—landlord's opposition to application for new lease—whether Board of Governors of teaching hospital intending to occupy premises for the purposes of a " business " to be carried on by them or as agents for Ministry of Health.—This case decided a somewhat technical point under the Landlord and Tenant Act, 1954, and may be dealt with shortly. The authorities of a teaching hospital had purchased the reversions of leases of property occupied by the lessees for business purposes. As a result of the National Health Service Act, 1946, the reversions vested in the Board of Governors as endowment property. The board agreed to sell the property, when vacant possession had been obtained, to the Ministry of Health for use for hospital purposes, the intention being that the Minister should own the premises but that the board should run them for the purposes in question. When the normal term of the leases expired the lessees claimed a new tenancy, and the board opposed it under section 30 (1) (g) of the 1954 Act, on the ground that they intended to occupy the property for hospital purposes, being a " business " within the meaning of the Act. The sole question was whether the board could be said to intend to occupy the property for the purposes of an activity to be carried on by them, or, whether the board, being merely the Minister's agents, could not be said to intend so to occupy the property, any intended occupation being that of the Minister. This question depended upon the relationship between the board and the Minister. Hodson L.J. thought that they were the Minister's agents, so that, on the principle of *Pegler* v. *Craven* [1952] 2 Q.B. 69, they could not rely on section 30 (1) (g), but the majority of the court (Denning and Morris L.JJ.) held that the board's relationship to the Minister was not merely that of agent to principal. The board were entrusted with the task of managing the hospital and the Minister could not take that task out of their hands.

If the Minister could be said to occupy the property, the board occupied it also, occupation, unlike possession, not being necessarily exclusive. Hodson L.J. rejected this last proposition.

(Woodfall, 25th ed., Permanent Supplement, p. 24)

Atkinson v. *Bettison* [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340

Landlord and Tenant Act, 1954—*opposition by landlord to application for a new tenancy on the ground that the landlord intended to reconstruct a substantial part of the premises—landlord's primary purpose to obtain possession for own business—question whether proposed reconstruction was of "substantial" part.*—In this case the landlord of business premises opposed an application by the tenant for a new lease under Part II of the Landlord and Tenant Act, 1954, on the ground (s. 30 (1) (f)) that he intended to reconstruct a substantial part of the premises and required possession in order to do so. It was found as a fact that the landlord's real purpose was to get possession in order to carry on his own business on the premises, and that the proposed reconstruction was ancillary to this purpose; he would not have proposed to carry it out for the tenant. The landlord could not rely on section 30 (1) (g) (which provides for the case where the landlord intends to occupy the premises for his own business) since he had purchased his interest within five years of the date of termination of the lease, and was thus barred by section 30 (2). It was held by the Court of Appeal, applying the principle of *J. W. Smart (Modern Shoe Repairs) Ltd.* v. *Hinckley and Leicestershire Building Society* [1952] 2 All E.R. 846, that the landlord could not rely on section 30 (1) (f), since his *primary purpose* was to get possession for his own business and not to reconstruct a substantial part of the premises. The court also held that there was evidence to support the county court judge's finding that in any case the proposed work did not constitute the reconstruction of a "substantial" part of the premises. The proposed reconstruction consisted of the provision of a new type of shop front, the demolition of a wall at the back, the re-laying of the floor in a new material and the provision of extensive new shop fittings.

(Woodfall, 25th ed., Permanent Supplement, p. 23)

Wheeler v. *Mercer* [1955] 3 W.L.R. 714; [1955] 3 All E.R. 455

Landlord and Tenant Act, 1954—*tenancy at will—protected under Part II.*—The Court of Appeal in this case decided that a tenant at will held under a "tenancy agreement" within the meaning of section 69 of the Landlord and Tenant Act, 1954, and hence was protected by Part II of the Act. The landlord could, therefore, terminate the tenancy only by notice in the prescribed form given

not less than six months before the date specified in the notice. The court did not accept the argument that tenancies at will were not covered because section 25 contemplates any tenancies which came to an end either by notice to quit or by effluxion of time, whereas a tenancy at will determines by demand. Denning L.J. expressed the view *obiter* that where a purchaser goes into possession under a treaty for purchase, and the sale goes off, he is not a tenant at will (see *Errington* v. *Errington* [1952] 1 K.B. 290) and in any case such a person does not hold under a "tenancy agreement" within the meaning of section 69. The opinion of Denning L.J., it may be noted, is contrary to that of the editors of Woodfall (25th ed.), where it is said (p. 305) on the authority of a number of old cases that "a person is likewise tenant at will who is admitted pending a treaty for purchase."

(Woodfall, 25th ed., p. 305; Permanent Supplement to 25th ed., p. 14)

Treseder-Griffin v. *Co-operative Insurance Society Ltd.*
[1955] 3 W.L.R. 996; [1955] 3 All E.R. 793

"Gold clause" as lease—construction—lessee's liability to pay in legal tender equivalent in value to gold coin.—In this most interesting case the "gold clause" is considered for the first time in litigation concerning a contract between two parties both British subjects and domiciled in this country. In view of the apparently endemic character of inflation in modern economies clauses of this kind are of growing importance and no doubt conveyancers will devote more attention to them than hitherto. The actual clause in this case was in a lease and by it the lessees covenanted to pay "yearly during the said term either in gold sterling or Bank of England notes to the equivalent value of gold sterling the rent of £1,900 to be paid without any deduction except for landlords' property tax, land tax and tithe redemption annuity by equal quarterly payments on March 25, June 24, September 29 and December 25 in every year." Lord Goddard C.J. held that, although the expression "gold sterling" was a misnomer, the object of the clause was to protect the lessors against currency depreciation, the expression "gold sterling" should be read "gold coin," and the lessors were accordingly entitled to receive every quarter the number of bank notes which would be required to buy at current prices gold coins from an authorised dealer of the standard weight and fineness to the value of £475. Thus, following *Feist* v. *Société Intercommunale Belge D'Electricité* [1934] A.C. 161, Lord Goddard gave effect to the intention of the "gold clause" and held that it amounted to a definition of the means by which the debt was to be measured and ascertained, and not a definition of the means by which it was to be discharged; *i.e.*, it gave rise to an obligation to pay in legal tender of the stipulated currency an amount which on the day of payment would be sufficient to buy gold coins corresponding to the nominal amount of the debt.

Bagettes Ltd. v. *G. P. Estates Ltd.* [1955] 3 W.L.R. 602; [1955] 3 All E.R. 451

Landlord and Tenant Act, 1954—*" business " within Part II of the Act—subletting of residential flats not a " business."*—This case decided a short point under Part II of the Landlord and Tenant Act, 1954, namely, that the subletting of parts of premises as residential flats with a view to making a profit from the rentals is not a business in respect of which the person carrying it on is entitled to security of tenure under Part II. As Wynn-Parry J. pointed out (the proceedings took the form of an originating summons in the Chancery Division for a declaration that Part II did not apply) it was perhaps unfortunate that the 1954 Act did not contain a provision similar to section 17 (3) (b) of the Landlord and Tenant Act, 1927, which expressly declared that premises did not qualify for protection " by reason that the tenant thereof carries on the business of subletting the premises as residential flats." In the present case a property company had a leasehold interest in a block of flats which expired on March 25, 1955. Most of the flats were sublet and the only parts of the premises which the company could be said to " occupy " were certain rooms in the basement used for storage and caretaker's quarters, the stairs, landing and passages, and, possibly, vacant flats. It was conceded that even if the company were to succeed in getting an order for the grant of a new tenancy in respect of the parts of the premises which it could be said to " occupy " within the meaning of section 23, this would only enable it to establish a nuisance value in subsequent negotiations with the landlords. Wynn-Parry J. " recoiled " from making an order in these circumstances, and his decision, although not perhaps unassailable on mere construction, commends itself to common sense.

(Woodfall, 25th ed., Permanent Supplement, p. 3)

Upsons Ltd. v. *Robins Ltd.* [1955] 3 W.L.R. 584; [1955] 3 All E.R. 348

Landlord and Tenant Act, 1954—*application under Part II for a new lease—court's discretion in regard to length of tenancy granted —matters which may be taken into account.*—In this case the only question was as to the duration of a new tenancy to be granted under section 33 of the Landlord and Tenant Act, 1954. The landlords, who wanted the premises for their own business purposes, were unable to oppose the grant of a tenancy under section 30 (1) (g) because their interest had been purchased two months short of the qualifying period of five years laid down in section 30 (2). The Court of Appeal, affirming the decision of the county court judge, held that, in exercising the discretion given to the court by section 33 in regard to the duration of the tenancy to be granted, it was proper to take into account (1) the fact that the landlords wanted the premises for their own purposes, (2) the fact that the landlords had failed by just two

months to bring themselves within section 30 (1) (g), (3) the fact that the tenants were a powerful group with multiple shops and the landlords a small firm with one shop only, so that the balance of hardship was on the side of the landlords, (4) the facts that there was a real danger that the landlords might have to quit the premises which they were at present occupying and that they had bought the reversion of the premises which were the subject of the proceedings with the object of transferring their business to the latter when the lease fell in. Section 33 enabled the court to take into account "all the circumstances" in deciding on the length of the new tenancy, and none of the above circumstances was improperly considered.

(Woodfall, 25th ed., Permanent Supplement, p. 27)

Sills v. *Watkins* [1955] 3 W.L.R. 520; [1955] 3 All E.R. 319

Rent Restrictions Acts—alternative accommodation—offer of council house in adjoining housing area—not suitable alternative accommodation.—This case decided the short point that, except where a certificate is given under section 3 (2) of the Rent Act, 1933, by the local authority for the area in which the dwelling-house of which possession is sought is situated, the offer of a council house (which affords no security of tenure) is not an offer of suitable alternative accommodation. A certificate under section 3 (2) could not be given in this case because the dwelling-house of which possession was sought was not in the area of the local authority where the council house was situated. The landlord was prepared, with the local authority's blessing, to offer the council house which he occupied in exchange for the dwelling-house.

(Megarry, 8th ed., p. 277)

R. v. *Paddington North and St. Marylebone Rent Tribunal, ex p. Perry and Others* [1955] 3 W.L.R. 744; [1955] 3 All E.R. 391

Housing Repairs and Rents Act, 1954—increased cost of services —application for increased rent—limits of High Court's control over rent tribunals.—This is another decision which illustrates the limited extent to which the proceedings of rent tribunals are subject to control by the courts. No doubt the peculiarities of rent tribunals will be considered by the Committee on Administrative Tribunals and Inquiries set up under the chairmanship of Sir Oliver Franks. In the present case the tribunal appears to have acted upon some very unsatisfactory evidence, but then, as we already know from the *Marine Parade Case* [1950] 2 K.B. 410, the tribunal need not act on any evidence at all. As long as both parties are given an opportunity of stating their cases, tribunals can make such inquiries as they think fit, can act on their own knowledge and impression and without evidence.

Certiorari does not lie to quash a tribunal's decision if it acted within its jurisdiction and there was no error of law on the face of the record, even if the tribunal made mistakes in weighing the evidence or acted on insufficient evidence or ruled out or took into account matters which they should not. The tribunal listed certain contractual and non-contractual services in a schedule to their decision, and all the matters so listed appeared to be services within section 40 of the 1954 Act. The case is noteworthy for Ormerod J.'s expression of opinion that the definition of services in the Furnished Houses (Rent Control) Act, 1946, should not be incorporated into the 1954 Act. The court were prepared to accept that the following were capable of being services within the 1954 Act:—central heating, constant hot water, passenger and service lifts, lighting and heating of lounge, hall, passages and staircases, porterage, cleaning common parts, removal of refuse, pest control, and floor coverings to common parts.

(Megarry, 8th ed., pp. 315, 361, 371)

Burden v. *Hannaford* [1955] 3 W.L.R. 606; [1955] 3 All E.R. 401

Agricultural Holdings Act, 1948—*incorporation of statutory clauses set out in the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948—*contractual term excusing tenant from liability to repair hedges—effect on statutory clause imposing liability.*—There is a decision of considerable importance under the Agricultural Holdings Act, 1948, and, like some other decisions of the Court of Appeal on the 1948 Act, is contrary to the views hitherto held by commentators, and is not without difficulties. Under the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, which are, by section 6 (1) of the 1948 Act, deemed to be incorporated in every contract of tenancy of an agricultural holding " except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other," the liability to repair hedges is imposed on the tenant. In the present case, the written contract of tenancy imposed no liability on either party for the repair of hedges, but expressly provided that the tenant should *not* be liable to repair them. The Court of Appeal held (1) that the statutory clauses, including the clause placing the liability to repair hedges on the tenant, were " incorporated " in the contract, since the exclusion quoted above did not apply, (2) that, notwithstanding the " incorporation," the contractual term excusing the tenant from liability prevailed over the statutory term imposing liability. Consequently the tenant was not liable to repair the hedges. The difficulties about this decision seem to be, first, that it does not give a very intelligible meaning to " incorporated," since it makes the incorporation *pro tanto* ineffective, and, secondly, that it is not easy to reconcile with section 7 (1), section 7 (2) and section 7 (4) of the 1948 Act. These difficulties have been elaborated elsewhere (see J.P.L., January 1956, p. 15) but it may be said here that it is a pity that there is no discussion of them in any of the judgments in the Court of Appeal.

7. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.) or *Taxation Newspaper* (Taxation).)

Anglo-French Exploration Co. Ltd. v. *Clayson* (*Inspector of Taxes*)
[1955] 1 W.L.R. 1314; [1955] 3 All E.R. 779;
[1955] T.R. 291 (Ch.D.)

Income Tax—Trading receipt—Sum paid on termination of agency and office of secretary

Statutory provisions: Income Tax Act, 1918, Schedule D, Case I (now Income Tax Act, 1952, s. 123).

Point: An unusual case expanding the formidable line of authority on the question of whether a sum received ostensibly on account of loss of office is an income or capital receipt. The case accentuates the necessity of analysing the real nature of the payment and placing reliance on the description given to it by the parties only if such description is supported in substance by the facts.

Facts and Decision: The appellant company traded in shares and also provided agency and secretarial services for other companies the receipts and outgoings in respect of which were included in its Case I assessment. The appellant company was a substantial but not a majority shareholder in a South African company for which it provided services as above for a remuneration under a contract terminable at 6 months' notice. In 1949 the appellant company, together with another shareholder in the South African company (whose holding aggregated with the appellant company's exceeded 50 per cent.), sold their shares to a purchaser at 35s. a share, the purchaser paying to the appellant company £20,000 in addition in consideration of its vacating its office as secretary and agent. Of this £20,000 some £16,000 was retained by the appellant company the remainder being paid to the other vendor. The amount retained, although credited to capital reserve as "compensation for loss of office," was assessed to tax as a trading receipt of the appellant company. The appellant company contended that the payment was the purchase price of a capital asset, namely the agency contract.

Held: This was money earned by the company in the course of its trade and therefore a trading receipt. Harman J., after noting that the company and its co-vendor held a majority of shares in the South African company, but that the company alone did not, and that therefore the agency contract was only worth more than 6 months' purchase if these vendors worked in harmony, pointed to the fact that the co-vendor, who had no agency contract, received part of the price ostensibly paid therefor. The two main shareholders in effect received more than the 35s. per share paid to other shareholders because their concurrence was essential to the purchaser's take-over bid.

Although the parties agreed that the additional moneys were not part of the consideration for the shares, Harman J. held (at 1 W.L.R. p. 1322) that: "Apart from the holding of the shares the secretaryship was worth little or nothing. It was only the appellant's special position that enabled them to obtain this money. It was in fact a sum earned in the course of the company's trade, namely, the sale of shares, and, even though not part of the purchase price, was only earned because of the holding of the shares and by way of inducement to part with them."

Collis v. *Cadle* [1955] T.R. 219; 34 A.T.C. 207 (Ch.D.)

Income Tax—Appeal—Set-off

Statutory provision: Income Tax Act, 1952, s. 51.

Point: Until an assessment is established no debt is owed to the Revenue by the taxpayer and hence there can be no set-off against such "debt" of a sum owed to the taxpayer.

Facts and Decision: The appellant was assessed in respect of certain interest received from Defence Bonds. Whilst admitting that the interest had been received the appellant contended that he had a number of claims against the Inland Revenue, *e.g.*, in respect of post-war credits. The General Commissioners held they had no jurisdiction to consider any such claims on an appeal.

Held: The Commissioners were correct. Even on the assumption that the appellant had a valid claim against the Revenue, which was not decided, there being no debt owing by him he could not seek to set-off sums alleged to be owing to him by the Revenue.

Bingham v. *C. I. R.* [1955] 3 W.L.R. 663; [1955] 3 All E.R. 321; [1955] T.R. 239

Surtax—Annual payments—Alimony

Statutory provision: Income Tax Act, 1918, All Schedule Rules, r. 19; Finance Act, 1927, s. 39 (3) (now Income Tax Act, 1952, ss. 169 and 2 (2) respectively).

Point: In order to be a charge upon a taxpayer's income so as to be deductible in computing his total income for purposes of surtax assessment, annual payments must be of such a nature that the taxpayer would be entitled to deduct tax at the standard rate on making such payments.

Facts and Decision: Under a decree of a Dutch court made on the dissolution of his marriage in 1929, when he was resident and domiciled in the Netherlands, the taxpayer paid to his former wife

some £4,000 per annum by way of alimony. In 1934, the taxpayer came to England but his former wife remained abroad, payments being made to her abroad. In computing his total income for surtax purposes the taxpayer claimed to deduct the payments to his wife which were made out of his profits or gains brought into charge to tax due. It was admitted that in making the payments of alimony the taxpayer was not entitled to deduct tax at the standard rate, but had to make the payments in full: *Keiner* v. *Keiner* [1952] 1 All E.R. 643.

Held: The payments could not be deducted. Harman J. relying on the authority of *Earl Howe* v. *C. I. R.* [1919] 2 K.B. 336 (premiums of sinking fund policies) and *Rossdale* v. *Fryer* [1922] 2 K.B. 303 (rents), held that where you cannot make the deduction of standard rate tax from the recipient of the payments you cannot deduct the payments in assessing total income for surtax purposes.

Re Parkes' Settlement [1955] T.R. 233 (Ch.D.)

Estate Duty—Beneficial interest accruing or arising

Statutory provisions: Finance Act, 1894, s. 2 (1) (d); Finance Act, 1934, s. 28.

Point: Just as the Crown is unable to exact duty from the subject without showing that the case falls within the wording of a taxing statute so likewise the subject does not escape taxation if his case is within such wording, however " monstrous " the claim may be. The Finance Acts are arbitrary in their operation, and it cannot be argued that no beneficial interest arises on the death of the deceased merely because there is no real difference between the enjoyment which the beneficiaries had before and after the death. It is the *interest* which arises which is of importance in a claim under the Finance Act, 1894, s. 2 (1) (d) and not the *pecuniary benefit* in addition to previous benefit. If the interests held prior to the death and after the death are different interests although of approximately similar amounts in value, a claim will lie under the said section.

Facts and Decisions: The trustees of a settlement were thereby directed to hold the income of the trust fund during the lifetime of the settlor upon trust to pay the same unto and equally between the two daughters of the settlor so long as they should remain unmarried (which they did) but so that the income so to be paid to each of them should not exceed £250 in any year and subject to that trust to pay the surplus income arising in each year unto and equally between the four children of the settlor. After the death of the settlor the trustees were directed to appropriate and retain out of the trust fund in respect of each unmarried daughter a fund sufficient to produce an annuity of £250 and to pay such annuity to such daughter so long as she should continue unmarried with power to make up the annuity out of the capital of such fund. Such funds were to revert to and become subject to the trusts affecting the trust fund

on the cesser of the annuities. Subject to these trusts the trust fund and the income thereof were to be held for such of the said four children of the settlor as should be living at his death and if more than one in equal shares. The Commissioners of Inland Revenue claimed estate duty under the Finance Act, 1894, s. 2 (1) (d) in respect of the two annuities of £250 cash and in respect of the capital of the trust fund so far as not required to provide the appropriated funds. The income during the settlor's life had been rarely sufficient to provide the two daughters with £250 per annum cash. It was argued that the enjoyment had by the two daughters was in substance the same both before and after the death, namely annuities of £250 per annum, and hence that no benefit arose.

Held: The Commissioners' contentions were correct. The *interests* of the daughters after the death were interests of a different nature from anything they had before *i.e.*, two definite annuities to be made up out of capital if necessary, as against a right to a possibly fluctuating income subject to an upper limit. Similarly, the *interests* of the children in capital were contingent until death when they obtained vested interests which were fresh interests. Both these fresh interests being clearly provided by the deceased, the settlor, fell within the terms of the Finance Act, 1894, s. 2 (1) (d).

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8. *MISCELLANEOUS*

Peterborough Corporation v. *Holdich* [1955] 3 W.L.R. 626; [1955] 3 All E.R. 424

Public health—dustbin—provision by owner or occupier—obligation to order someone to provide.—In Vol. 17 of the *Conveyancer* at p. 328 we summarised the law relating to the provisions of dustbins outside London. In short, a local authority can either supply the dustbins themselves and make a charge for the service or require the owner or occupier to provide one. If they adopt the latter course the person served with the requisition may appeal to petty sessions on the ground that it is not equitable that he should have to supply the dustbin and he must bring the other person interested before the court. In the instant case the requisition was served on the owner who appealed. When the matter came before the court it allowed the appeal but refused to make an order against the occupier. The local authority appealed to the Divisional Court by way of case stated. It was argued against the local authority that the decision of petty sessions was right, for the Local Government (Miscellaneous Provisions) Act, 1953, s. 8 (4), provides that on the hearing of the appeal the court "may" make an order against the owner or occupier, and, if it does not make the order, the local authority can provide the dustbin themselves: see *R.* v. *Nottingham Quarter Sessions, ex p. Harlow* [1952] 2 Q.B. 601, 625. The Divisional Court held that the power of the local authority

to supply dustbins was purely permissive and accordingly, once it was proved there was no adequate dustbin, an order must be made against either the owner or the occupier.

Practice Direction (Writ of Possession) [1955] 1 W.L.R. 1314; [1955] 3 All E.R. 646

Consequent upon the decision of the Court of Appeal in *Barclays Bank Ltd.* v. *Roberts* [1954] 1 W.L.R. 1212 these further directions are given:—

Where the defendant or any other persons are in actual possession of the premises of which possession is sought, an affidavit applying for leave to issue a writ of possession must contain the following information in addition to that indicated by the form in the practice books:

(a) Whether the premises or any part thereof is a dwelling-house.
(b) If so (i) what is the rateable value of the dwelling-house; (ii) whether it is let furnished or unfurnished and, if furnished, what is the amount of furniture therein.
(c) Any other matters which will assist the master in determining whether any occupier is protected by the Rent Acts.

F. ARNOLD BAKER,
Senior Master.

November 14, 1955.

THE REVALUATION FOR RATING AND RENT RESTRICTED PREMISES

By J. Muir Watt

The financial impact of the revaluation for rating which comes into operation on April 1, 1956, upon the occupiers of residential and commercial premises has been the subject of much discussion and speculation. Until the various rate poundages are published no one will know for certain the size of his particular bill. It is evident, however, that there exists a good deal of misconception about the incidental effects of the revaluation upon the position of rent-controlled property, whether the latter consists purely of a dwelling-house or whether it consists of mixed premises, such as a shop with a dwelling-house combined. The purpose of this short note is to deal with a few of the questions which arise in this connection.

Does the Revaluation remove Premises from the Rent Acts?

A question which is frequently asked is whether, if the new rateable value of the dwelling-house with effect from April 1, 1956, exceeds £100 in London or £75 elsewhere (to take the new control limits) the dwelling-house is taken out of the Rent Restrictions Acts. The answer to this is, No. The test is the rateable value "on the appropriate day," which is defined in section 7 (1) of the Rent and Mortgage Interest Restrictions Act, 1939, as April 6, 1939, in the case of London and April 1, 1939, elsewhere. Of course, if the dwelling-house was first assessed after that date, the material date is the date when it was first assessed (s. 7 (3)). The revaluation, therefore, does not decontrol any premises, and this is so whether the controlled premises are a dwelling-house pure and simple or a dwelling-house-cum-shop.

Does the Revaluation affect "Gross Value" for the purposes of the Housing Repairs and Rents Act, 1954?

Does the revaluation affect the amount of the "statutory repairs deduction" by reference to which the amount of the repairs increase is measured under section 23 (2) of the Housing Repairs and Rents Act, 1954, or the "gross value" which governs the operation of the "stopper" under section 24 of the same Act? The answer again is, No. Section 49 (3) of the 1954 Act defines "the appropriate" day for determining the gross value (which in turn determines the statutory repairs deduction in accordance with the tables in the Third Schedule) as August 30, 1954, if a gross value for the dwelling-house was then shown in the valuation list in force, or, if not, the first day after that date when a gross value for the dwelling-house was shown. It must be borne in mind in this connection, and in connection with this subject generally, that by section 35 of the Housing Repairs and Rents Act, 1954, dwelling-houses erected or converted after August 30, 1954, are excluded from the Rent Acts.

Effect of Increases of Rates on Controlled Rent

The extent to which the actual bills for rates in respect of residential property will be increased as a result of the revaluation is at the moment doubtful, as the effect of the shift of part of the burden to commercial property and the possible reduction in rate poundages is difficult to forecast. Some increases in the bills, however, there will be. Where the landlord is responsible for the payment of rates he can pass on the increase as a permitted increase subject to and in accordance with the provisions of the Rent Acts. This is so whether the premises are a pure dwelling-house or are mixed premises consisting of a dwelling-house and shop. The provisions of section 12 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, should, however, be noted in this connection. This contains machinery for suspending the operation of a notice of increase of rent on account of increased rates, in a case where a proposal is made for the alteration of the valuation list so as to reduce the value ascribed to the premises in question, until after the proposal has been settled. The effect of the proposal is, as a result of section 1 (7) of the 1955 Act, to limit the amount recoverable in rates, until the proposal is settled, to the amount payable in the last year before revaluation. By virtue of section 12 the tenant, in effect, can obtain a corresponding suspension of his liability to pay the increase of rent. The landlord's notice of increase must contain certain prescribed information about the tenant's rights in this respect, and the form of the "suspense notice" which the tenant can serve on the landlord must be in a prescribed form. Regulations under section 14 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, will prescribe the information and the form of notice required. Such Regulations have not yet been issued. When the new assessment is finally determined, any unpaid balance of rent on account of the increase of rates can be recovered from the tenant as if it were arrears of rent, but not so as to constitute a ground for eviction. Section 12 of the 1955 Act should be studied in detail.

Rating of owners: Compounding allowances

In the absence of specific provisions to deal with the point, the effect of increased rateable values due to the revaluation would have been to take a number of properties outside the limit of the rateable values prescribed by resolutions passed by rating authorities under section 11 of the Rating and Valuation Act, 1925, for the rating of owners instead of occupiers. Such owners became entitled, on payment of the amount due within a certain time, to a compounding allowance. These arrangements have applied to a large number of rent controlled properties. Section 4 (5) of the 1955 Act meets the point by providing that rating authorities may by resolution direct that hereditaments which were within compounding arrangements before the revaluation shall remain within those arrangements for the period of the new lists if their new rateable values, although above the old compounding limit, do not exceed a new limit specified in the resolution. A resolution under section 4 (5) must fix a new limit, but it should be noted that, however high the new limit may be, it

will not bring into compounding any hereditament which was not subject to compounding under the old resolution. The compounding allowances are safeguarded by section 4 (6), which substitutes the maximum rateable value specified in a resolution under section 4 (5) for the rateable value referred to in paragraph (*b*) of section 11 (1) of the Rating and Valuation Act, 1925. One little point in regard to compounding allowances may be mentioned here. The provisions of section 1 (7) of the 1955 Act for limiting the amount recoverable in rates, while the settlement of a proposal is pending, have been referred to above. In order to qualify for the compounding allowance under section 11 of the 1925 Act, however, the full amount of rates *due* as the basis of the new rateable value in the list, and not the limited amount *recoverable* by virtue of section 1 (7) of the 1955 Act, must be paid. Owners and their agents should be aware of this point.

CORRESPONDENCE

To the Editor,

The Conveyancer and Property Lawyer

Requisitioned Houses—Compensation and Income Tax

Dear Sir,

With reference to the note on page 410 of the November/December, 1955, issue which deals with the Requisitioned Houses (Compensation) Regulations, 1955, you refer to the question of income tax on such payments.

Readers of your publication may be interested in the following letter which this Federation recently received from the Secretary to the Board of Inland Revenue following representations made by the National Federation.

"In reply to your letter of 27th October, I am directed by the Board of Inland Revenue to say that in their view the compensation payable under Section 4 (2) (c) of the above Act to the owner of a requisitioned house in consideration of his accepting the occupant as a statutory tenant is not liable to income tax except where the recipient is carrying on a trade which consists of or includes dealing in property."

This would appear to confirm the view tentatively taken by your note.

Yours faithfully,

Reginald Sizen

General Secretary.

National Federation of Property Owners.

Westminster, 6th January, 1956

THE LIBRARY

The Conversion of Old Buildings into New Homes. By C. Bernard Brown, L.R.I.B.A. London: B. T. Batsford Ltd. 218 pp. (£2 5s.)

This is a practical book on conversion of buildings dealing with the subject from all aspects. The last part deals with legal problems and contains a number of precedents. The precedents relating to long leases of flats are well drawn and bear in mind the difficulties that may arise out of the treatment of payments for repairs, etc., as rent for the purposes of the Rent Restrictions Acts and out of the assessment of Schedule A tax on the freeholder. It is not, however, true that if the lessees covenant to reimburse the Schedule A tax to the freeholder he is in the same position for practical purposes as if the lessees had been assessed in the first place, for this entirely ignores the effect on the freeholder's surtax position and, if the freeholder is a company, on profits tax. On the other hand, one hears few, if any, complaints today with regard to assessment on the freeholder and the subject appears to be becoming one of academic interest. The precedent for the conveyance of a freehold flat does not seem so happy, as it is difficult to see what protection a flat-owner has if the vendor sells the rentcharge and fails to carry out his obligations. We doubt whether a building society or local authority would be content with it.

The book is not intended for lawyers but, having regard to the 155 attractive illustrations, some in colour, the high standard of the production and the author's pleasant and clear style, they would do better to forgo some more orthodox textbook and invest their £2 5s. in its purchase. The trouble is that when their wives lay hands on it, they will immediately want to move or, at least, have drastic alterations and reconstruction made to their present abodes.

E. F. G.

Law and Practice of Building Contracts including Architects and Surveyors. By Donald Keating, B.A., Barrister-at-Law. London: Sweet & Maxwell Ltd. xliv, 328 and (index) 21 pp. (£2 10s.)

The author does not tell us for whom he is writing, but we suspect that he had in mind principally solicitors, with an eye on architects and surveyors. At any rate, he has not fallen between two stools and written a book which tries at the same time to pretend that it is written both in a legal and in a non-legal style. We cannot say how architects and surveyors react to a book written in a legal style for lawyers, but lawyers who have anything to do with building contracts will welcome the book, for until now there has been little short of the formidable *Hudson,* which does not really suit the practitioner who has to advise occasionally on building contracts.

There is a useful glossary of building terms prepared by Mr. Paul Badcock, F.R.I.B.A., and the author has had the good sense to get Sir Tom Eastham, Q.C., to read through the section dealing with Scott Schedules. Quite rightly, considerable attention has been given to the R.I.B.A. forms of contract. The test of the value of a book of this kind is whether answers can be found to the problems likely to be encountered in practice on the subject, and by this test the book passes with honours.

J. H. G.

Miscellany-at-Law. By R. E. Megarry. London: Stevens & Sons Ltd. 365 and 49 pp. (£1 5s.)

Mr. Megarry is one of those authors who does not think erudition incompatible with literary style or difficulty of subject with facility of exposition. We must congratulate him on his decision to turn from the flippancy of the Rent Restrictions Acts to the serious business of providing for the lawyer's leisure. Every articled clerk and student coming across some striking passage in the law reports decides to make a note of it and, of course, he does not. For example, who remembers who said that insanity was a disability, not a privilege? Was it in *Drew* v. *Nunn*? Sometimes we remember the cases where the passages are more substantial, or even whole judgments worth rereading. Mr. Megarry has proved the exception and made the notes, and then put the notes into literary form. How he has managed to collect so much is his secret, but there is something for everyone and the whole work is a delight. It does not consist merely of the witty and humorous; there is a leaven of the serious. Occasionally, the author seems to have broken his own rules and given us anecdotes, but the footnotes bear ample testimony to the authorities for the propositions stated. After all, who can cavil at the citation of the rather unorthodox law reports known as *Uncommon Law*, for they have been cited in the Divisional Court?

Naturally, everyone will try to trace his favourites. Some will be there, others he will miss. The author chose *Barrett* v. *Irvine* [1907] 2 I.R. 462, surely the most humorous judgment ever delivered, and *Glyn* v. *Weston Feature Film Co.* [1916] 1 Ch. 261, which does not wear so well, but rejected *The Blow Boat* [1912] P. 217. We have always regarded the short judgment of under two pages in that case as providing one of the liveliest descriptions of a day at one of the Cinque Ports. As South African reports have not been eschewed, we are sorry that van den Heever J.A. is not represented. His humble approach to the precepts of the lawgiver appears from the following passage: "I do not presume to criticise the language used by the Legislature; I merely state my difficulties in fathoming its intention as expressed. To me sec. 76 *bis* is nearly unintelligible. Forgetting the inclusion of a name within a name, which is not relevant for the moment; eliminating surplusage and leaving out the proviso for the nonce, the words may be ordered as follows . . ." (*British Chemicals & Biologicals* v. *S. A. Pharmacy Board* [1955] 1 S.A.L.R. 184, 196). The same learned judge's dissenting judgment in *R.* v. *Pretoria Timber Co.* [1950] 3 S.A.L.R. 163, 183 is a fine example of caustic wit at the expense of a draftsman who, in a Government Notice, sought to define an area by points. When the suggestion was made that you arrived at the area by joining the points by straight lines, it was pointed out that, the earth's surface being curved, the lines would go underground; if you were to take rhumb-lines, what projection would be taken; and, in any event, in what order would you select your points?

The answer to all criticisms of any anthology is that if the critic does not like the selection, let him make his own. For our part we merely add our praise to that we have already heard from various readers and a word of caution: do not skip the index or the glossary, where will be found the only intelligent statement of the rule in *Shelley's* case we have ever come across. We look forward to the second *Miscellany*.

E. F. G.

A Guide to Compulsory Purchase and Compensation. Third edition. By R. D. Stewart-Brown. 1955. Sweet & Maxwell Ltd. xvi and 93 and (Appendices) 19 and (index) 5 pp. (18s. 6d.)

This little book is no more than the guide it makes out to be: a set of the relevant statutory provisions alone would be many times its size. This is,

however, a subject in which a guide is useful if not essential to anyone but the specialist, and the present book should continue to find wide acceptance amongst these members of the legal profession who sometimes but not often have to advise on such matters. The legislation of 1954 has made a good deal of difference to this subject, and the book has been brought up to date accordingly; although the Appendices—which have been added to, but have not (it would seem) been revised for some years—now read a little oddly.

T. A. B. W.

Emmet's notes on Perusing Titles and Practical Conveyancing, Vol. I. 14th edition, 1955, by J. Gilchrist Smith, Solicitor, Deputy Town Clerk of Middlesbrough. xcix+630+56 pp. Solicitors' Law Stationery Society Ltd. (£4.)

The new edition of Emmet on *Title*, produced only six years after the last, is as satisfactory as its predecessor. The completeness, the clarity of style and the comprehensive references to the standard conditions of sale, the new Law Society's Digest and current periodical literature easily retain for the new edition the high reputation enjoyed by this book in the past.

As on previous occasions, volume I, which covers the sale of land in the strict sense (though including also compulsory purchase) is published first. Another volume is to be published shortly to deal with such matters as leases, mortgages, registered land, settlements and trusts and town planning.

Particular changes in the new edition which deserve mention include the substantial revision of the early chapters on preliminary inquiries and searches and the contract for sale. The effect of the landlord and tenant and town planning legislation of 1954 upon conveyancing practice has been fully discussed in these revised chapters. In addition, the chapter on mistake in relation to contracts for sale, which in the last edition caused difficulty by employing an unfamiliar classification, has been substantially rewritten.

All the recent developments of the law by judicial decision appear to have been considered: in particular there is a very thorough discussion (pp. 344–345) of the problems of the deserted wife's licence to occupy the matrimonial home. Also discussed are the conveyancing aspects of recent cases on statutory trusts for sale (*Bull* v. *Bull*; *Cooper* v. *Critchley*) and the new mortmain problems which have come to be associated with the name of Morelle Ltd., though, of course, the book was published before the House of Lords decision in *Att.-Gen.* v. *Parsons*.

Omissions are rare indeed; it is almost with hesitation that the reviewer suggests that *Pearlberg* v. *May* [1951] 1 All E.R. 1001, might have been cited in support of the text on p. 220 (interest chargeable on purchase money where completion delayed, even where the money is paid into court under an order in pending litigation). Again, mention might have been made on p. 429, in the discussion of the covenants for title imported by L. P. A., s. 76, of the emphatic dicta of Harman J. in *Pilkington* v. *Wood* [1953] 2 All E.R. 810, at p. 813, which are contrary to the view expressed in the text.

The standard of textual accuracy and the type and turnout of the book are uniformly pleasing. In his preface to the 13th edition the editor said that the book "was designed to deal fully with all matters arising in normal conveyancing practice." The 14th edition amply justifies the claim.

H. R. G.